(6)

No. 89-658-CFY
Status: GRANTED

Title: John L. Cheek, Petitioner
v.
United States

Docketed:
October 19, 1989

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Coulson,William R.

Counsel for respondent: Solicitor General

NOTE: See 28.2 re dock dt

Entry	Date	Note	Proceedings and Orders
1	Oct 19 1989	G	Petition for writ of certiorari filed.
3	Nov 16 1989		Order extending time to file response to petition until December 22, 1989.
4	Dec 22 1989		Order further extending time to file response to petition until January 21, 1990.
5	Jan 22 1990		Brief of respondent United States filed.
6	Jan 24 1990		DISTRIBUTED. February 16, 1990
7	Feb 20 1990		Petition GRANTED.
			**********
8	Apr 5 1990		Joint appendix filed.
9	Apr 5 1990		Brief of petitioner Cheek filed.
11	May 7 1990		Order extending time to file brief of respondent on the merits until May 18, 1990.
12	May 18 1990		Brief of respondent United States filed.
13	Jun 18 1990		Reply brief of petitioner John Cheek filed.
14	Jun 27 1990		Record filed.
		*	Certified copy of original record and proceedings, 2 boxes, received.
15	Jul 2 1990		CIRCULATED.
16	Jul 23 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 3, 1990. (2ND CASE)
17	Sep 21 1990	X	Supplemental brief of petitioner Cheek filed.
18	Oct 3 1990		ARGUED.

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89-658

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that petitioner's beliefs must also be "objectively reasonable"—and some of them are deemed "objectively unreasonable as a matter of law." The result is that petitioner—despite the sincere good faith on which he based his defense—can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique "objectively reasonable" test in criminal tax cases, under which petitioner was convicted and sentenced to jail because the Court announced (a) that his sincerely-held beliefs had to be "objectively reasonable," and (b) that some of his beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which Petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner John L. Cheek respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 21, 1989. (The mandate was stayed by the Court of Appeals on October 10, 1989; *see Appendix F.*)

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is *Appendix A* to this Petition.

JURISDICTIONAL STATEMENT

The August 21, 1989 judgment of the United States Court of Appeals for the Seventh Circuit (*Appendix A*) affirmed petitioner Cheek's March 16, 1988 criminal conviction (*Appendix B*). This Court's jurisdiction rests upon 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed . . . .

26 U.S.C. Sec. 7201 provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall in addition to other penalties

> provided by law, be guilty of a felony and upon conviction thereof shall be fined not more than $100,000 . . . or imprisoned not more than 5 years or both, together with the costs of prosecution.

26 U.S.C. Sec. 7203 provides in pertinent part:

> Any person . . . required this Title or by regulations made under authority thereof to make a return, . . . who willfully fails . . . to make such return, . . . at the time or times required by law or regulations shall in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 . . . or imprisoned not more than 1 year or both, together with the costs of prosecution.

18 U.S.C. Sec. 287 provides:

> Whoever makes or presents to any person or officer or to department or agency thereof, any claim upon the United States or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than 5 years and shall be subject to a fine in the amount provided in this Title.

STATEMENT OF THE CASE

The basis for Federal jurisdiction in the court of first instance, *i.e.*, the District Court, is Title 18, U.S.C., Sec. 3231, which states:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

On March 9, 1987 petitioner John L. Cheek, a pilot for American Airlines since 1973, was indicted on three counts of willful income tax evasion for the tax years 1980, 1981, and 1983 (in violation of 26 U.S.C. Sec. 7201), one count of wilfully submitting a false claim against the government for income tax withheld in 1982 (in violation of 18 U.S.C. Sec. 287), and three counts of willful failure to file income tax returns for the tax years 1980, 1981, and 1983. Later that year, on September 14, 1987, a superseding indictment was issued adding three counts of willful failure to file for the years 1984, 1985, and 1986. (*Appendix A.*)

At his jury trial, petitioner proceeded *pro se*. He presented, by way of defense, evidence of his sincerely-held view that he did not believe he had violated the law in failing to comply with the tax laws as charged (*i.e.*, that his conduct was not "willful").

Before closing arguments in the trial, the District Court conferred with the parties regarding instructions to the jury. The Court agreed to give the willfulness instruction from *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976), which read:

> When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

(*Appendix C* at 20.) Two other instructions on willfulness were discussed. The first was a definition of "objectively reasonable good faith misunderstanding" which was originally tendered as Government Instruction 38 (*Tr.* 1565-1566) and, after redrafting by the Court, was given, over

petitioner's objections, as Jury Instruction No. 32. It was read as follows:

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

(*Jury Instruction* No. 32; *Tr.* 1684; *Appendix C* at 20.) Government counsel asserted that this instruction was accurate. (*Tr.* 1565-1566.) The second instruction at issue was a theory of defense instruction prepared by the Court (*Tr.* 1553-1554, 1559-1562) and given as Jury Instruction No. 53. (*Tr.* 1690-1691; *Appendix C* at 21.) Instruction 53 discussed, among other things, petitioner's belief that he was not a taxpayer, that his wages did not constitute income, and that he was not required to file tax returns.

Instructions 32 and 53 both told the jury that they were to determine if petitioner's beliefs in regard to his tax obligations were both honest and "objectively reasonable." The District Court told petitioner that these instructions allowed him to argue to the jury that his beliefs were honest and reasonable, regardless of whether his beliefs were correct under the law. (*Tr.* 1560-1562, 1568-1569, 1579.) The Government agreed. (*Tr.* 1565-1566, 1568.) This

was the law of the case which was argued by the parties and which was submitted to the jury. The jury was troubled. At approximately 4:30 p.m. on the first full day of deliberations, a note was received from the jury which stated, *inter alia*:

> We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 is the one we cannot get by as to his belief.

(*Appendix D* at 23.) Over petitioner's objection,[1] in answer to this note, the Court gave the jury what was, in essence, previously-rejected Government Instruction No. 38, which stated:

> You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.
>
> The government has the burden of proving willfulness beyond a reasonable doubt.

(*Reinstruction* No. 1; *Tr.* 1723-1724; *R.* 135; *Appendix D* at 24.)

[1] Petitioner, in objecting to the supplemental instruction proposed by the Government, told the Court: "They are trying to get a directed verdict of guilty, which is not the system of justice." (*Tr.* 1709.)

Several hours later at 7:10 p.m. the jury was deadlocked, sending out another note, which stated:

> We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision.

The note was signed by all the jurors. (*Jury Note* No. 2; *Tr.* 1726; *Appendix D* at 24.) This note contained no request for clarification and no question relating to the instructions.

At the Government's request, the District Court gave a further supplemental instruction, which stated, *inter alia:*

* * *

> An objectively reasonable belief means a belief held by a reasonable person acting reasonably. *An honest but unreasonable belief is not a defense and does not negate willfulness.*
>
> * * *
>
> *Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable* and cannot serve as the basis for a good faith misunderstanding of the law defense.

(*Tr.* 1757-1759; entire instruction is *Appendix D* at 25; emphasis added.) Petitioner objected to this second supplemental instruction (*Tr.* 1750, 1756), stating: "It just seems to me like the Court is just writing everything so that I don't have any defense at all."

Approximately 2½ hours after being given this second supplemental instruction, the jury returned with guilty verdicts on all counts. The jury also sent three notes to the Court. The first note was signed by all the jurors; the other two were written by individual jurors. The first note said:

> Judge Plunkett:
>
> We are herein returning our verdict of guilty as charged on all counts.
>
> Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

(*Appendix E* at 27.)

The second note, from an individual juror, stated:

> Judge Plunkett:
>
> I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law.

The third note, written by juror Diener, prompted a brief colloquy with the court:

> THE COURT: Mr. Diener writes:
>
> "A 'Honest and Sincere in His Cause'—He is Guilty
>
> B Not 'Objectively Reasonably' He Is Guilty."
>
> Mr. Diener, I am a little unsure of what this expresses.
>
> JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way—you know, he's guilty, he's—his honesty and sincerity is sincere.
>
> THE COURT: I see.
>
> JUROR DIENER: The other part —
>
> THE COURT: But not objectively reasonable?
>
> JUROR DIENER: (sic) Is guilty.
>
> THE COURT: Okay.
>
> JUROR DIENER: I was trying to bring that out to clarify—
>
> THE COURT: I see what you're saying. All right.

(*Appendix E* at 27; *Tr.* 1763-1765.)

The District Court sentenced petitioner to a year and a day in prison. The Court, however, permitted petitioner to remain free on bail pending appeal, stating: "I do not regard any appeal here as frivolous." (*Tr.* 1798.)

After affirming petitioner's convictions, the Seventh Circuit Court of Appeals granted his motion to stay its mandate pending this Court's ruling on the instant petition for a writ of *certiorari*. (*Order* of October 10, 1989, *Appendix F.*)

REASONS FOR GRANTING THE WRIT

I. Introduction

Petitioner John Cheek was convicted of specific intent felonies under jury instructions which required him, by way of defense, to show that his beliefs about his legal duties were not only sincerely and honestly held, but also "objectively reasonable." The supplemental jury instructions expressly told the jury that some of his proffered beliefs were, as a matter of law, not objectively reasonable. These instructions embodied the application of the Seventh Circuit's "objectively reasonable" standard for good faith defenses in income tax cases.

Clearly the jury had great difficulty applying the "objectively reasonable" standard to petitioner's case. Two of the jurors stated in notes to the Court that they believed that petitioner was sincere in his misunderstanding of his legal duties. All of the jurors signed the note which complained that the "objectively reasonable" standard was a "narrow and hard expression."

II. Reasons For Granting Certiorari

In this case, the Seventh Circuit itself acknowledges that its unique "objectively reasonable" test is in direct conflict with at least seven other Circuits, all of which espouse a subjective standard which allows a jury to determine a defendant's good faith *vel non* based on what the defendant (in the jury's view) honestly believes. This Court's Rule 17 sets out, as a reason for granting *certiorari*, that a Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of

Appeals on the same matter. Such is clearly the situation here.

Rule 17 also asks whether a Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court, or has decided a Federal question in a way in conflict with applicable decisions of this Court. Both criteria also apply. The Seventh Circuit not only has departed from the prevailing law in seven other Federal Circuits, but has also chosen to ignore fundamental criminal law holdings of this Court. This Court has consistently held, as a constitutional matter, that criminal intent is a jury question. *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976); *Morissette v. United States*, 342 U.S. 246 (1952). This Court has also held that conclusive presumptions or instructions in criminal cases raise serious constitutional questions. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The Seventh Circuit's contrary approach here has broad implications for the administration of criminal law, not only in tax cases but also (for example) in mail fraud and false statement cases, in which a defendant's good faith also figures as a valid defense.

Moreover, petitioner Cheek believes that the Seventh Circuit's unique "objectively reasonable" test has unfairly resulted in his felony conviction even though the jury clearly did *not* find that he possessed criminal intent at the time of his alleged offenses.

Only this Court can act to bring the Seventh Circuit into conformity with other Circuits and with this Court's own decisions.

III. Constitutional Principles

The crimes of which petitioner was convicted—tax evasion, failure to file tax returns, and filing a false claim—all require the Government to prove willfulness beyond a reasonable doubt. No one doubts that.

In *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976), this Court squarely held that in a criminal tax case the Government must establish beyond a reasonable doubt that the defendant's actions were willful; that is, "a voluntary, intentional violation of a known legal duty."

In our system of justice, criminal intent is the cornerstone of criminal responsibility. *Morissette v. United States*, 342 U.S. 246 (1952). This Court in *Morissette* held that when intent is an element of the crime charged, its existence is a question of fact for the jury that cannot be taken from them by instructions from the court. Under our Constitution, it is the jury which decides the guilt or innocence and, particularly, the criminal intent of a defendant. This is a fundamental element of our jury guarantee of the Sixth Amendment. *Sandstrom v. Montana*, 442 U.S. 510 (1979) (conclusive presumptions which impinge upon this jury function violate the due process clause of the Fifth Amendment and invade the fact-finding function of the jury).

Our tax collection system, of which criminal prosecution is a part, has proceeded successfully for many years, consistent with these constitutional guarantees. The Seventh Circuit's change of heart in 1985—a pure attempt to unilaterally muzzle inconvenient dissent—cannot be allowed to overturn these well-established standards.[2]

In this case, petitioner Cheek's defense was good faith. The Seventh Circuit's "objectively reasonable" standard resulted in his jury being instructed not only that his good faith beliefs must be in addition "objectively reasonable" (*Appendix C*), but also, after the arguments and after the jury had begun deliberating, that certain of his beliefs were as a matter of law not "objectively reasonable" and could not constitute a defense. (*Appendix D* at 24 and 25-26.) These instructions violated *Morissette*, *Sandstrom*, and their progeny.

In *United States v. Murdock*, 290 U.S. 389 (1933), this Court said:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

See also Sansone v. United States, 380 U.S. 343 (1965) (criminal liability would attach if the defendant "knew that he should have reported more income than he did"). In *United States v. Bishop*, 412 U.S. 346 (1973), the Court embraced what three years later became the settled *Pomponio* formulation of willfulness: "a voluntary, intentional violation of a known legal duty." The Court added that, within the tax system, "degrees of negligence give rise

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[2] The "objectively reasonable" standard has been applied by the Seventh Circuit only to the so-called "tax protester" prosecutions. This term apparently loosely refers to persons who the government believes do not pay taxes for reasons of political protest. *See United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

to nothing more than civil penalties." *Pomponio* itself involved a taxpayer defense that the returns filed were not false, because the taxpayers believed that certain payments to them were loans, not dividends, and that questioned losses belonged to their partnership. This Court held, *inter alia*, that the defendants could not be found guilty if they actually believed as they claimed. No suggestion was made that in addition to a sincere actual belief defendants' position would have to be "objectively reasonable." Here, as in *Pomponio*, petitioner's defense was that he held certain beliefs as to his duty to file and as to his duty to report certain items as income. However, as required by the Seventh Circuit, the District Court instructed the jury that the petitioner's beliefs had to be "objectively reasonable,"[3] even if honestly held, in order to pass muster—and that some of those beliefs, however bona fide, were simply not permitted to be advanced.

IV. The Other Circuits

One would expect, and it is so, that other Circuits have applied *Pomponio* and its progeny to tax cases involving evasion and failure to file. In *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985), Judge Coffin collected both this Court's and the Circuit law to reject the Government's effort to engraft an "objectively reasonable" standard on tax cases, and reversed the defendant's conviction. Judge Coffin noted that in the context of the criminal tax laws: "The mistake of law defense has particular vitality, and the key is whether the defendant honestly held a mistaken

[3] No guidance was given the jury as to the meaning of "objectively reasonable" until the second supplemental instruction, which told the jury that certain of petitioner's proffered beliefs were *not* objectively reasonable.

belief as to what the law requires." 755 F.2d at 193. Other Circuits concur. *United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956) ("ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negate willfulness in failure to perform the duty"); *Mann v. United States*, 319 F.2d 404, 409-410 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964) (plain error to instruct the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequences of his conduct"); *see also, United States v. Burton*, 737 F.2d 439, 441 (5th Cir. 1984) (holding that a taxpayer's claimed belief that wages are not income need not be objectively reasonable to constitute a defense); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); *Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) ("If a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a tax return"); *Haigler v. United States*, 172 F.2d 986, 989 (10th Cir. 1949) ("We think it irreconcilably inconsistent to say in one breath that guilty knowledge of the consequences of the act done is the essence of the offense and in the next breath say that ignorance of the consequences of those acts is no excuse"); *United States v. Ware*, 608 F.2d 400, 405 (10th Cir. 1979) (while good faith disagreement with the law is not a defense, a good faith misunderstanding of its requirements is). In the above seven Federal Circuits, a defendant accused of tax evasion or willful failure to file has a "good faith" defense. In those Circuits, the defendant does not have the added burden of convincing the jury that his beliefs, although sincerely held, are "objectively reasonable" (whatever that

may mean). And in those Circuits, the defendant does not face the obstacle that some of his beliefs may have been determined to be "unreasonable" as a matter of law.

V. The Seventh Circuit

Consistent with the prevailing view in this Court and in these seven Circuits, the Seventh Circuit originally applied the "subjectively reasonable" standard. ***E.g.***, *United States v. Matosky*, 421 F.2d 410, 413 (7th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970), (nowhere suggesting that good faith had also to survive a "belief test" as "objectively reasonable"). It was not until *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), that the Seventh Circuit first mentioned that the mistake-of-law defense must be "objectively reasonable." As other Circuits have recognized, this statement was *dictum*. Indeed, notwithstanding *Moore*, no "objectively reasonable" instruction was given in the next several "tax protester" cases before the Seventh Circuit. *See United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982); *United States v. Koliboski*, 732 F.2d 1328, 1329 (7th Cir. 1984). In fact, *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984), held—consistent with the other Circuits—that in a failure to file tax case a defendant's beliefs, even if unreasonable, can constitute a defense.[4]

Then came four cases in 1985 and 1986. These cases departed from the view in other Circuits, and also from the Seventh Circuit's *Dack* opinion, by announcing the "objectively reasonable" standard as the law of the Seventh Circuit. *United States v. Thibodeaux*, 758 F.2d 199 (7th Cir. 1985); *United States v. Witvoet*, 767 F.2d 338, 340 (7th Cir. 1985); *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1986), *cert. denied*, 474 U.S. 1082 (1986); *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986). In all four cases, the Government's proffered "objectively reasonable" instruction was given. In all four cases, the Seventh Circuit held that a proper objection had not been made and that this instruction was not plain error, given all the facts of those cases. In the next three such cases, the "objectively reasonable" instruction, although mentioned, was not squarely dealt with. *United States v. Foster*, 789 F.2d 457, 461 (7th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *United States v. Ferguson*, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1986); and *United States v. Sato*, 814 F.2d 449, 451 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 294, 98 L.Ed. 254 (1987). Not until 1987, in *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987), and *United States v. Davenport*, 824 F.2d 1511, 1517 (7th Cir. 1987), did the Seventh Circuit expressly embrace the "objectively reasonable" standard—regardless of the law in other Circuits, and regardless of earlier Seventh Circuit law. The crowning blow was *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987), in which the Seventh Circuit approved the Government's "preemptive strike," in which a number of potential willfulness defenses were precluded before trial as objectively unreasonable as a matter of law.[5] *Dube*, *Davenport*, and *Buckner*, are ex-

[4] "We agree that Dack was entitled to an acquittal if he could demonstrate a bona fide belief in the necessity of a tax assessment, even if that belief was objectively unreasonable." *Dack* at 1175.

[5] Petitioner's alleged offenses occurred from 1981 through 1987. During this period, the elements of the defenses to these charges changed in the Seventh Circuit, from *Moore* to *Dack*, then back to *Witvoet*. There are serious *ex post facto* problems in applying 1985 legal standards to a 1984 alleged offense, for example.

pressions of impatience with tax protesters, and single out this type of defendant for extraordinarily harsh treatment. In a contemporaneous civil case, the Seventh Circuit anathematized tax protesters as "thorns in the side of the federal judiciary." *McLaughlin v. Commissioner*, 832 F.2d 986 (7th Cir. 1987).[6] Yet we do not—do we?—throw "cranks" in jail as a handy means of shutting them up.

Even the Seventh Circuit has not suggested that its unique second-guessing of beliefs applies to anyone other than inconvenient tax protesters. The Seventh Circuit has not been impelled to such second-guessing in any other kinds of tax cases, or in other cases in which specific intent is an element and in which good faith can be a defense, such as mail fraud cases and false statement cases. Indeed, in this case the District Court told petitioner, after sentencing him to prison, that he could fill out the Government forms as he believed: "Nobody will charge you with perjury, if you honestly believe something and you turn out to be mistaken." (*Tr.* 1800.)

VI. Implications Of The "Objectively Reasonable" Standard

Enough. We have juries. They are the oil—sometimes unwanted, but the fabric of what we are—on the hinges of our judicial system. It is for them, not a panel of professionals (a governmental agency to boot), to decide whether Cheek believes what he says. No doubt he is an uncomfortable "thorn in the side." But we have built a nation on the view that however annoying he may be, he is *not*, if he can convince a jury of his *bona fides*, a

[6] Even "tax protestors," of course, are entitled to due process and a jury trial on a criminal charge.

criminal.[7] In any other Circuit, he would have been heard. In the Seventh Circuit, the jury was forbidden to listen as a matter of law.

The questions from the jurors during their deliberations and the notes which they tendered to the Court show that at least some jurors were convinced that petitioner sincerely held his beliefs (however uncomfortable). The District Court's supplemental instruction, given to solve the jury's dilemma, barred the jurors from accepting many of petitioner's good faith beliefs as a defense. Even the District Court was troubled by that harsh rule: "If you're in Mr. Cheek's position, is it the law in this circuit now that a tax protester has no defense?" *Tr.* 1786. (The Government said, in substance, "yes.") At sentencing, the District Judge added: ". . . I do not want to sentence you for beliefs that I believe were honestly held, although I believe foolishly held." (*March 16, 1988 Tr.* 4.) *See also United States v. Wojtas*, 611 F.Supp. 118, 122 (N.D. Ill. 1985). ("As it happens, this Court believes an objective standard of 'reasonable belief' is incorrect.")

Even the Department of Justice in recommending tax case instructions to United States Attorneys' Offices throughout the country, has said no to the Seventh Circuit's view. *See* CRIMINAL TAX MANUAL, U.S. Dept. of Justice—Tax Division, Criminal Section, U.S. Gov't Printing Office, 1986 Ed. (Proposed Instruction No. 87 for violation of Title 26, U.S.C., Sec. 7203). Nowhere in that Manual does the Department urge prosecutors to include the requirement that a defendant's beliefs be "objectively reasonable."

[7] There are, of course, myriad civil and administrative penalties which can be imposed in a tax matter regardless of the presence of criminal intent.

The Seventh Circuit's "objectively reasonable" standard is an anomaly. It does not exist in prior holdings of this Court. Even the Department of Justice does not espouse it.

Petitioner Cheek—or anyone else, however unpopular or a "crank"—should not be subjected to a uniquely paternalistic view which every other Circuit which has considered the question has found unpersuasive, and which this Court has held impermissible. We do not undertake to control beliefs. Only this Court can make that plain to the Seventh Circuit.

CONCLUSION

For the foregoing reasons, petitioner John L. Cheek respectfully requests this Court to grant this Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit, and to reverse the conviction of petitioner John L. Cheek.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1582

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN L. CHEEK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 161—**Paul E. Plunkett,** *Judge.*

ARGUED DECEMBER 6, 1988—DECIDED AUGUST 21, 1989

Before COFFEY, MANION, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Defendant-appellant John L. Cheek appeals his conviction of three counts of tax evasion, one count of false claims against the government for income tax withheld, and six counts of willful failure to file individual tax returns. He challenges his conviction on numerous grounds. Chief among these grounds are the arguments that the district court erred in instructing the jury on his theory of defense, and that the district

court's reinstruction of the jury was improper. For the reasons discussed below, we affirm.

I. Facts

Defendant John L. Cheek is a pilot for American Airlines, where he has worked since 1973. From 1969 to 1979, he properly filed tax returns. For the tax years of 1980 through 1986, however, he did not file tax returns, except for 1982, when he filed a frivolous return. From January, 1980, to January, 1981, he filed frivolous W-4 forms claiming an increasing number of withholding allowances, eventually claiming as many as 60. Thereafter, he claimed on his W-4 form that he was exempt completely from taxation.

During this time, Cheek also filed civil suits against American Airlines and the Internal Revenue Service. The suit against American Airlines claimed that taxes were wrongly withheld by American from his wages. In his suit against the IRS, Cheek claimed, for various reasons, that he was not required to pay any income tax. In one of these cases, not only did the district court find Cheek's position frivolous, but also fined him $10,000.00 (subsequently reduced on appeal to $5,000.00) for bringing this suit. *See Cheek v. Doe*, 828 F.2d 395 (7th Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 349, 98 L. Ed. 2d 374 (1987). Cheek also appeared at the criminal tax trials of other persons.

On March 9, 1987, Cheek was indicted with three counts of tax evasion for the tax years 1980, 1981, and 1983 (in violation of 26 U.S.C. § 7201), one count of false claims against the government for income tax withheld in 1982 (in violation of 18 U.S.C. § 287), and six counts of willful failure to file income tax returns for the tax years 1980, 1981, 1983, 1984, 1985 and 1986 (in violation of 26 U.S.C. § 7203).

Before closing arguments in the trial, Judge Plunkett conducted a jury instruction conference. Among the instructions he discussed was proposed Government Instruction No. 38. This instruction read:

> A person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection system and policies does not constitute a good faith misunderstanding of the law.

The trial judge then modified this instruction. Given to the jury as Jury Instruction No. 32, this instruction now read:

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

Also given to the jury was Instruction No. 53, Cheek's theory of defense instruction. The court had drafted this instruction for Cheek. It discussed, among other things, Cheek's belief that he was not a taxpayer, that his wages did not constitute income, and that he was not required to file tax returns.

The jury began its deliberations on the morning of November 10. At 3:00 that afternoon, it sent out a note asking for a transcript of Cheek's testimony in which he discussed his beliefs. The court denied this request. At about 4:15 p.m., the jury sent out a second note. This note stated in part:

> We have a basic disagreement between some of us as to if Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes . . . Page 32 [the modified Government Instruction No. 38] discusses good faith misunderstanding and disagreement. Is there any clarification you can give us on this point? Page 53 [presumably Jury Instruction No. 53] is the one we cannot get by as to his belief.

In the ensuing discussion about this note, the government pointed out to the court that in revising Government Instruction No. 38, the court had eliminated the statements that a person's opinion that the tax laws violate his constitutional rights and a person's disagreement with the government's tax collection do not constitute a good faith misunderstanding of the law. Judge Plunkett's response to the jury's note included a supplemental instruction with these missing statements.

At 7:10 p.m. that day, the jury sent out another note saying that it still could not reach a decision because "we are divided on the issue as to if Mr. Cheek honestly and reasonably believed that he was not required to pay income tax." When the jurors resumed deliberating on November 12, the government moved for the court to clarify its instructions to the jury before it resumed its deliberations. Judge Plunkett agreed with this request, and gave the jury a second additional instruction. This instruction stated that "an honest but unreasonable belief is not a defense [to the charges] and does not negate willfulness," and that "advice or research resulting in a conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." Coupled with this instruction was the *Silvern* instruction (commonly referred

to as the "dynamite" or "blasting" charge), which the court previously had given to the jury.[1]

Two and-a-half hours later, the jury returned with its verdict. With this verdict, it included several notes that it wanted the court to read after the verdict was read. Before reading any of the notes, the court clerk read the guilty verdict aloud, and the judge polled the jury. Each of the jurors affirmed that the guilty verdict was his or her own. After reading the notes, the judge polled the jurors once again. None of them indicated any disagreement with the verdict.

The first note, signed by all twelve jurors, stated that they found defendant "guilty as charged on all counts" and that some jurors wished to express their personal opinions—opinions "not meant to affect in any way their verdict of guilty." It said that these notes were given to

---

[1] This instruction provides:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

United States v. Silvern, 484 F.2d 879, 883 (7th Cir. 1973) (*en banc*); *see also United States v. Sblendorio*, 830 F.2d 1382, 1386-90 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1034, 98 L. Ed. 2d 998 (1988).

the judge as "a complaint against the narrow and hard expression under the constraints of the law." Another one of these notes said: "I know the gentleman is guilty of a crime. However, I honestly believe he believed so deeply in his cause that he has risked everything for this cause and truly does not believe that he is breaking the law." The last note said: "(A) 'Honest and Sincere in his Cause'—He is *Guilty*" and "(B) Not 'Objectively Reasonable' He is *Guilty*."

Cheek now raises numerous challenges to his conviction. Only two of these merit discussion in detail. These are Cheek's challenge to the notion that the standard of whether his belief that he was not breaking the law was valid was one of "objective reasonableness," and his argument that it was error for the district court to have reinstructed the jury.

II. Discussion

A. *Instructions to the Jury*

1. *Use of the "Objectively Reasonable" Standard*

All of the crimes of which Cheek was convicted require willfulness. In *United States v. Pomponio*, 429 U.S. 10, 97 S. Ct. 22, 50 L. Ed. 2d 12 (1976), the Supreme Court held that "willfully in the context of the Internal Revenue Code" simply means "a voluntary, intentional violation of a known legal duty." *Id.* at 12, 97 S. Ct. at 23. Under the proper circumstances, however, a good faith misunderstanding of the law may negate willfulness. *See, e.g., United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082, 106 S. Ct. 852, 88 L. Ed. 2d 892 (1986). Cheek argues that the district court erred in instructing the jury that such a good faith misunderstanding of the law must be "objectively reasonable." Cheek contends that every other circuit that has ruled on the issue of whether a good faith misunderstanding of the law must be objectively reasonable has decided to the contrary, and has adhered to a subjective standard of reasonableness. *See, e.g., United States v. Whiteside*,

810 F.2d 1306, 1310 (5th Cir. 1987); *United States v. Phillips*, 775 F.2d 262, 264 (10th Cir. 1985); *United States v. Aitken*, 755 F.2d 188, 191 (1st Cir. 1985); *Cooley v. United States*, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123, 95 S. Ct. 809, 42 L. Ed. 2d 824 (1975); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir.), *cert. denied*, 351 U.S. 969, 76 S. Ct. 1034, 100 L. Ed. 1487 (1956); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); *see also United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983) (good faith misunderstanding of the law negates willfulness, but a good faith disagreement does not); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.), *cert. denied*, 462 U.S. 1131, 103 S. Ct. 3111, 77 L. Ed. 2d 1366 (1983) (defendant's subjective intent is a jury question).

Regardless of what the other circuits have ruled on this issue, this circuit has, in recent years, emphatically adhered to the "objectively reasonable" standard. *See, e.g., United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987); *United States v. Davenport*, 824 F.2d 1511, 1517-18 (7th Cir. 1987); *Bressler*, 772 F.2d at 290; *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S. Ct. 1360, 67 L. Ed. 2d 342 (1981). To the extent that this court's opinion in *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984) could be interpreted to mean that an "objectively unreasonable" belief can negate willfulness, our later cases have made it clear that this is not so. Thus, the district court did not err in instructing the jury that an "objectively reasonable" good faith misunderstanding of the law negates willfulness.

2. *Reinstruction of the Jury*

Cheek next argues that the district court erred in reinstructing the jury, particularly where this reinstruction was not solicited by it. He raises numerous challenges to this reinstruction, and we address these challenges in turn.

In *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946), the Supreme Court said, "When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." Cheek contends that the district court's reinstruction of the jury violated this principle. This is because, Cheek claims, the jury's notes to the judge when it was having difficulty in reaching a verdict were not explicit about what its difficulties with the instructions at issue were. Cheek contends that in reinstructing the jury, the district court (and the government as well) merely guessed at the jury's difficulties.

We disagree. Once it is clear that a jury has difficulties concerning the original instructions, reinstruction is appropriate. *Cf. United States v. Zabic*, 745 F.2d 464, 475 (7th Cir. 1984) (once questions arose among the jurors concerning the original instructions, " '[t]he trial court [had to] exercise its sound discretion in determining what type of supplementary instructions should be given to a deliberating jury that seeks clarification of the law.' ") (citation omitted). Of course, whether or not to give reinstruction at all is within the discretion of the trial court. *United States v. Castenada*, 555 F.2d 605, 611 (7th Cir.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 152, 54 L. Ed. 2d 113 (1977); *United States v. Braverman*, 522 F.2d 218, 224 (7th Cir.), *cert. denied*, 423 U.S. 985, 96 S. Ct. 392, 46 L. Ed. 2d 302 (1975). The character and extent of supplementary instructions, moreover, rests within the sound discretion of the trial court. *United States v. Keck*, 773 F.2d 759, 768 (7th Cir. 1985); *accord Zabic*, 745 F.2d at 475 (quoting *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.), *cert. denied*, 459 U.S. 975, 103 S. Ct. 310, 74 L. Ed. 2d 289 (1982)); *Castenada*, 555 F.2d at 611; *Braverman*, 522 F.2d at 224. In *United States v. Franco*, 874 F.2d 1136 (7th Cir. 1989), we set forth the factors upon which we focus in reviewing supplemental jury instructions. These are: whether the instructions as a whole fairly and adequately treat the issues, whether the instructions are a correct statement of the law, and whether the district court answered the jury's questions specifically. *Id.* at 1143 (citations omitted).

In this case, the district court did not abuse its discretion in deciding to reinstruct the jury on two occasions. It is apparent, contrary to Cheek's assertions, what the difficulties of the jury were. The jury clearly was focusing on the conflict between Jury Instruction No. 32 (an objectively reasonable good faith misunderstanding of the law negates willfulness) and Jury Instruction No. 53 (Cheek's theory of defense instruction, containing his beliefs). Jury Instruction No. 32 was incomplete without mentioning that beliefs that the tax laws are unconstitutional and that wages are not income, and disagreement with the government's tax collection systems and policies, do not constitute good faith misunderstandings of the law. Under *Bollenbach*, Judge Plunkett's reinstructions responded directly to the difficulties of the jury as set out by them, by providing more explicit instructions as to what constituted an objectively reasonable good faith misunderstanding of the law. None of these supplemental instructions, moreover, misstated the law in this circuit. As discussed above, a good faith misunderstanding of the law must be objectively reasonable. Moreover, the beliefs that wages are not income and that the tax laws are unconstitutional are not objectively reasonable as a matter of law. *Buckner*, 830 F.2d at 103-04; *United States v. Latham*, 754 F.2d 747, 750-51 (7th Cir. 1985); *Moore*, 627 F.2d at 833.[2]

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[2] For the record, we note that the following beliefs, which are stock arguments of the tax protester movement, have not been, nor ever will be, considered "objectively reasonable" in this circuit:

(1) the belief that the sixteenth amendment to the constitution was improperly ratified and therefore never came into being;

(2) the belief that the sixteenth amendment is unconstitutional generally;

(3) the belief that the income tax violates the takings clause of the fifth amendment;

(4) the belief that the tax laws are unconstitutional;

(Footnote continued on following page)

The original instructions in this case were incomplete and misleading, but the addition of the supplemental instructions gave the jury a correct statement of the law in this circuit. As in *Zabic*, once the jurors raised questions, the trial judge properly exercised his discretion by providing the jurors with an accurate, specific, statement of the controlling law. 745 F.2d at 475. As we discuss below, no defendant is entitled to an instruction that incorrectly states the law.[3]

The fact that the district court's second reinstruction of the jury was not specifically solicited by it, moreover,

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[2] *continued*

(5) the belief that wages are not income and therefore are not subject to federal income tax laws;

(6) the belief that filing a tax return violates the privilege against self-incrimination; and

(7) the belief that Federal Reserve Notes do not constitute cash or income.

Miller v. United States, 868 F.2d 236, 239-41 (7th Cir. 1989); *Buckner*, 830 F.2d at 102; *United States v. Dube*, 820 F.2d 886, 891 (7th Cir. 1987); *Coleman v. Comm'r*, 791 F.2d 68, 70-71 (7th Cir. 1986); *Moore*, 627 F.2d at 833. We have no doubt that this list will increase with time.

We also reject another absurd argument of Cheek's, made under the rubric of "subject matter jurisdiction," that he is not a "fourteenth amendment citizen," but rather a white male Christian with inherent and inalienable rights as defined in Article 1, Section 1 of the Illinois Constitution, and thus the federal government cannot tax his wages directly for the privilege of citizenship. This argument has no merit whatsoever. *Cf. United States v. Studley*, 783 F.2d 934, 937 (9th Cir. 1986) (rejecting the argument that taxpayer was an "absolute, free-born and natural individual," and therefore not subject to the tax laws).

[3] We believe that one could conclude, erroneously, from reading the theory of defense instruction given in this case, that Cheek's beliefs could be legally correct. Therefore, we suggest that when district judges give theory of defense instructions containing any beliefs that are incorrect as a matter of law (regardless of whether these beliefs are objectively reasonable), they should inform the jury of this fact within the theory of defense instruction.

does not constitute reversible error in this case. As discussed above, the reinstruction of the jury had the desired effect of resolving the jury's difficulties with the original, unclear instructions. *Cf. United States v. Cheramie*, 520 F.2d 325, 332-33 (5th Cir. 1975).

Cheek also argues that the district court's reinstruction of the jury violated Rule 30 of the Federal Rules of Criminal Procedure. This rule provided at that time,[4] in part:

> At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

Technical violations of Rule 30, assuming that one occurred here, require reversal only where the defendant can show actual prejudice. *United States v. Baker*, 722 F.2d 343, 346 (7th Cir. 1983), *cert. denied*, 465 U.S. 1037, 104 S. Ct. 1312, 79 L. Ed. 2d 709 (1984). Cheek presents three reasons why he was prejudiced by the district court's reinstruction of the jury under Rule 30. We reject all of these reasons.

First, Cheek argues that the reinstruction had the effect of changing the "law of the case" to a direction that his beliefs did not constitute a defense. We find this argument to be without merit. First, as noted above, the district court's reinstruction of the jury corrected its earlier, confusing and unclear instructions. A defendant is not entitled to have the jury instructed incorrectly on the law. *Cf. Baker*, 722 F.2d at 347 (defendant was not unfairly prejudiced under Rule 30 by the trial judge's decision to correct an incorrect instruction; defendant was never entitled to an instruction referring only to embezzle-

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[4] This rule was amended effective August 1, 1988.

ment). Moreover, we note with approval the words of the Fifth Circuit in *Cheramie*:

> Admittedly, these [instructions] helped guide the jury to a verdict. Yet, that assistance is the purpose of jury instructions. Moreover, these additional instructions, whose use remains within the sound discretion of the court, . . . correctly, and without prejudice to the defendant, reflected the state of the law.

520 F.2d at 332 (citations omitted).

Second, Cheek argues that the district court's reinstruction of the jury in violation of Rule 30 prejudiced him because he was unable to readdress the jury to explain his defense in light of the new instruction. As the government points out, however, Cheek's closing argument did not rely on any statements of law in the original jury instructions which might have been qualified by the supplemental instructions. Thus, Cheek was not prejudiced in this manner. *Baker*, 722 F.2d at 346.

Finally, Cheek argues that the reinstruction misstated his theory of defense and then directed the jury that this theory was not acceptable. We disagree with Cheek, as a preliminary matter, that the district court's reinstruction of the jury misstated his defense. The district court's original instruction to the jury on Cheek's theory of defense, Jury Instruction No. 53, was drafted by the court for Cheek and not rejected by him. This theory of defense instruction indicated, among other things, that Cheek's theory was that he "acted at all times in good faith—that is, that he honestly and reasonably believed that he was not required to file tax returns," that Cheek had "been attempting to test the constitutionality of the income tax laws," and that "Cheek [contended] that his wages from . . . American Airlines . . . do not constitute income under the Internal Revenue Service laws." Moreover, as discussed above, the reinstruction properly corrected the earlier, misleading, instruction. Thus, we do not think that Cheek was prejudiced in this regard by the reinstruction.

B. *Cheek's Other Contentions*

As noted above, Cheek raises a number of other challenges to his conviction. These challenges all are without merit, and hence do not require discussion. *Buckner*, 830 F.2d at 104. Nonetheless, we address a few of them briefly.

First, the district court clearly had jurisdiction of this case under 18 U.S.C. § 3231, which provides that the federal district courts have exclusive original jurisdiction over "all offenses against the laws of the United States." Sections 7201 through 7210 of Title 26 of the United States Code, as well as 18 U.S.C. § 287, are offenses against the laws of the United States. This court previously rejected any arguments to the contrary (with respect to Sections 7201-10, but this is equally applicable to 18 U.S.C. § 287 as well) in *United States v. Koliboski*, 732 F.2d 1328, 1329-30 (7th Cir. 1984). Other circuits too numerous to mention also have rejected this argument.

Second, Cheek argues that he was denied his right to counsel under the sixth amendment to the Constitution because he "could not find trial counsel with expertise on the Constitution and the Internal Revenue Code," and because his "friends were only allowed to act as helpers during certain stages of the trial." This argument is without merit. In *United States v. Thibodeaux*, 758 F.2d 199, 201 (7th Cir. 1985), this court specifically held that "[t]here is no constitutional right . . . to representation by non-lawyers or laymen." *Id.* at 201. In this case, the district court was even more generous than it need have been, for it permitted Cheek to have his friends sit with him at counsel table. In *Thibodeaux*, we noted that district courts need not permit this practice. *Id.*

Moreover, the district judge only insisted on proceeding without Cheek being represented by counsel after he had granted Cheek numerous continuances in order that he could find counsel. The court also suggested that Cheek consult with friends about attorneys, and even mentioned to Cheek the name of an attorney who had tried a tax protester case before the court (Tr. March 30, 1987 at 5;

Tr. May 19, 1987 at 7). This case also is similar to *Thibodeaux* in this respect. In that case, we held that the right to counsel may be waived if one able to afford counsel does not retain an attorney within a reasonable period of time. *Id.* Thus, we do not find that Cheek was denied effective assistance of counsel.

Third, we reject Cheek's argument that the government's evidence was insufficient as to his intent to violate the law. Cheek argues that the jury note which said that Cheek "truly does not believe that he is breaking the law" contradicts and negates the jury verdict of guilty. We reject this argument out of hand. Federal Rule of Evidence 606(b) provides that jurors may neither testify about nor provide affidavits concerning their mental processes. This court previously has interpreted this rule to mean that counsel may not, in most instances, offer the mental processes of jurors to impeach verdicts. *United States v. Sblendorio*, 830 F.2d 1382, 1389-90 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1034, 98 L. Ed. 2d 998 (1988) *and cases cited therein* ("A court will not inquire into the jury's deliberative process in the absence of a claim of external influence"); *United States v. Schwartz*, 787 F.2d 257, 261-62 (7th Cir. 1986) (jurors may only testify about "extraneous prejudicial information" or any "outside influence").[5]

Finally, we find that Cheek's numerous evidentiary objections are without merit. Even if the district court committed any error with respect to the admission of evidence, this error was harmless because of the overwhelming evidence of Cheek's guilt. *Cf. United States v. Manganellis*, 864 F.2d 528, 539 (7th Cir. 1988) ("An error is harmless

[5] Even if this were not so, the poll of the jury both before and after these notes were read indicates that their verdict truly was unanimous. The jury's notes, if anything, indicated that they were dissatisfied with the law, but that they nonetheless followed it as instructed. One of these notes even stated that any additional "opinions" were "not meant to affect in any way their verdict of guilty."

if the other untainted incriminating evidence is overwhelming"). Likewise, even if the district court erroneously refused to admit certain items of Cheek's proffered evidence, or improperly refused to let evidence which was admitted, but mislaid and not located until the jury began deliberating, go back to the jury, this was harmless error. This is not a case where the complained-of exclusion of evidence had a substantial effect on the jury's verdict by precluding Cheek from presenting his defense. *Cf. United States v. Peak*, 856 F.2d 825, 834-35 (7th Cir.), *cert. denied*, ____ U.S. ____, 109 S. Ct. 499, 102 L. Ed. 2d 535 (1988).

III. **Conclusion**

We conclude that the district court correctly instructed the jury that only an "objectively reasonable" good faith misunderstanding of the law negates willfulness. Moreover, the district court did not err in reinstructing the jury. Finally, this court had subject matter jurisdiction, Cheek was not denied effective assistance of counsel, the jury's notes did not "negate" its verdict of guilty, and Cheek's evidentiary objections are without merit.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 21, 1989.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL A. KANNE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 88-1582 vs.

JOHN L. CHEEK,

Defendant-Appellant.

Appeal from the No. Dist. of IL., East. Div.
No. 87 CR 161
Paul E. Plunkett, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX B

Judgment and Probation/Commitment Order of the United States District Court

[Page 1 of 2]

United States of America vs. JOHN L. CHEEK	United States District Court for Northern District of Illinois, Docket No. 87 CR 161-1

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL–
In the presence of the attorney for the government the defendant appeared in person on this date March 16, 1988.

_X_ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

___ WITH COUNSEL

PLEA–
___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

FINDING & JUDGMENT–
There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully attempted to evade tax; willful failure to pay tax; willful failure to file; and false claims, as charged in all counts of the Indictment. IN VIOLATION OF TITLE 26, U.S. CODE, SECTIONS 7201, 7202 and 7303 and IN VIOLATION OF TITLE 18, U.S. CODE, SECTION 287.

SENTENCE OR PROBATION ORDER–
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND One (1) DAY on each of Counts 1, 3 and 5. Said sentence on Counts 1, 3, 5 to run concurrently with each other.
IT IS ADJUDGED that on each of Counts 2, 4, and 6 through 10 the defendant is placed on probation for a period of FIVE (5) YEARS, on condition that he comply with the general conditions of probation. Said sentence on Counts 2, 4 and 6 through 10 to run concurrently with each other and consecutively with the sentence imposed on Counts 1, 3 and 5.

SPECIAL CONDITIONS OF PROBATION–
IT IS FURTHER ORDERED that the following conditions be imposed on probation:

1. defendant make his best efforts to pay back taxes, interests and penalties and to file future income tax returns on a timely basis
2. defendant to submit to an examination under oath with regards to his assets, by March 23, 1988.

IT IS FURTHER ORDERED that defendant pay a mandatory assessment for the costs of prosecution in the amount of $3,576.66

* * * * *

[Page 2 of 2]

* * * * *

SENTENCE OR PROBATION ORDER–
IT IS FURTHER ORDERED pursuant to 18 U.S.C. Section 3013(a) that the defendant is assessed the sum of $25.00 on each of Counts 7, 8, 9 and 10 and the sum of $50.00 on each of Counts 1, 3, 5 and 6 for a total assessment of $300.00.

IT IS FURTHER ORDERED that imposition of sentence is stayed pending appeal.

* * * * *

/s/ PAUL E. PLUNKETT
U.S. District Judge

Date March 16, 1988

APPENDIX C

Initial District Court Jury Instructions on Willfulness

Trial Transcript, p. 1684;
Government Instruction No. 32:

An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.

Disagreement with the law does not constitute a good faith misunderstanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

* * * * *

Trial Transcript, p. 1688;
Government Instruction No. 48:

* * * * *

When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

* * * * *

Trial Transcript, pp. 1690-1691;
Instruction No. 53:

* * * * *

It is the defendant John Cheek's theory that he did not willfully fail to file tax returns for the years 1980, '81, '83, '84, '85, '86, nor did he willfully attempt to evade and defeat the income taxes for the years 1980 through 1983.

Mr. Cheek's theory is that he acted at all times in good faith, that is, that he honestly and reasonably believed he was not required to file tax returns. Mr. Cheek contends that he honestly and reasonably believes he is not a taxpayer. He also contends that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns.

Mr. Cheek contends that his lawsuits against American Airlines and the Internal Revenue Service, his extensive legal research and his frequent conversations with several attorneys, including a written opinion from an attorney Robert L. Collins, demonstrate that he has an honest and reasonable belief that he is not required to file tax returns.

Among other things, Mr. Cheek contends that his wages from a private employer, American Airlines, does not constitute income under the Internal Revenue Service laws. Mr. Cheek also contends that his membership in MACBA and MCBA and his filings of W-4s with the Internal Revenue Service claiming 30 or 60 withholding allowances, as well as claiming exempt status, were not designed or intended to evade federal income taxes because he has contended since 1980 that he is not required to file tax returns or to pay federal income taxes.

If you find that Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes or to file tax returns, then you should find Mr. Cheek not guilty of all the charges.

* * * * *

APPENDIX D

Notes from the Jury during Deliberations and Corresponding Supplemental Instructions

D(1) Jury Note of 4:15 p.m., November 10, 1987, and Court's Supplemental Instruction:

Trial Transcript, pp. 1705-1706;
Note from the Jury:

* * * * *

(The following further proceedings were had herein at 4:33 o'clock, p.m.:)

THE COURT: I have the following communication from the jury, which I got about 15 minutes ago:

"Judge Plunkett:

"We as a jury have been unable to agree on a unanimous verdict.

"We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.

"We have struggled with this point for part of the morning & the entire afternoon with no movement.

"Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?

"Page 53 is the one we cannot get by as to his belief.

"James R. Burgener"

* * * * *

Trial Transcript, pp. 1723-1724;
Court's Supplemental Instruction:

* * * * *

THE COURT: Miss Safford, I was going to add to the instruction the following language, "You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.

"The government has the burden of proving willfulness beyond a reasonable doubt."

* * * * *

D(2) Jury Note of 7:10 p.m., November 10, 1987, and Court's Supplemental Instruction:

Trial Transcript, p. 1726;
Note from the Jury:

* * * * *

(THE FOLLOWING FURTHER PROCEEDINGS were had herein, in chambers, at 7:20 o'clock, p.m. of the same date:)

THE COURT: All right. The jury writes me at 7:10:

> "We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We

> are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision."

It is signed by Mr. Burgener and the 11 other jurors.

* * * * *

Trial Transcript, pp. 1757-1759;
Court's Supplemental Instruction:

* * * * *

THE COURT: Folks, I am going to give you a couple of additional instructions and then reread one I gave to you earlier. It is in response to a question the jury sent me two days ago about clarifying for you an honest and reasonable belief, and when I answered that I sent an answer which was not as complete as it should have been, and, accordingly, I am going to answer that question in a more complete manner by these additional instructions.

Ladies and gentlemen of the jury, an objectively reasonable good faith misunderstanding of the law negates willfulness. Whenever the word "reasonable" is used in these instructions it means objectively reasonable.

I instructed you that if you find Mr. Cheek honestly and reasonably believed he was not required to pay income taxes or to file tax returns you should find Mr. Cheek not guilty of all the charges.

To find Mr. Cheek not guilty under that instruction you must find both that Mr. Cheek held the belief honestly and that his belief was objectively reasonable.

An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfulness.

An objectively reasonable good faith misunderstanding of the law, as I told you before, negates willfulness.

An objectively reasonable good faith misreading of the law may be based on the defendant's own legal research or an attorney's advice if such research and advice are objectively reasonable.

Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct if there is a bona fide dispute of law on the issue.

Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense.

Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it.

Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

As I told you before, the government at all times bears the burden of showing willfulness.

* * * * *

APPENDIX E

Post-Verdict Notes from the Jury

Trial Transcript, pp. 1764-1765:

* * * * *

THE COURT: Now, the jury has written three documents for me which I will now read into this record.

The first note is signed by all the jurors and it says:

"Judge Plunkett:

"We are herein returning our verdict of guilty as charged on all counts.

"Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

"We would request that if possible this statement be read in court."

With that document is a document from Miss Keith that says:

"Judge Plunkett:

"I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law."

Mr. Diener writes:

"A "Honest and Sincere in His Cause"—He is *Guilty*

"B Not "Objectively Reasonable" He Is Guilty."

Mr. Diener, I am a little unsure of what that expresses.

JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way—you know, he's guilty, he's—his honesty and sincerity is sincere.

THE COURT: I see.

JUROR DIENER: The other part—

THE COURT: But not objectively reasonable?

JUROR DIENER: (sic) Is guilty.

THE COURT: Okay.

JUROR DIENER: I was trying to bring that out to clarify—

THE COURT: I see what you're saying. All right.

* * * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 10, 1989.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL A. KANNE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 88-1582 vs.

JOHN L. CHEEK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87-CR-161
Paul E. Plunkett, Judge

This matter comes before the court for its consideration upon the following documents:

1. "MOTION OF DEFENDANT TO STAY ISSUANCE OF THE MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on September 6, 1989, by counsel.

2. "GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY ISSUANCE OF THE MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on September 15, 1989, by counsel.

On consideration hereof,

IT IS ORDERED that the "MOTION OF DEFENDANT TO STAY ISSUANCE OF THE MANDATE PENDING APPLICATION FOR CERTIORARI" is GRANTED and the issuance in the mandate in this appeal will be stayed pending the Supreme Court's ruling on a petition for a writ of certiorari.

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-658

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
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QUESTION PRESENTED

Whether in this prosecution for willful violations of the tax laws, in which it was shown that petitioner was repeatedly made aware of his obligation to file income tax returns and to pay taxes, the district court erred in instructing the jury that willfulness may be negated by a good faith misunderstanding of the law only if petitioner's asserted misunderstanding was objectively reasonable.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-658

JOHN L. CHEEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 882 F.2d 1263.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16) was entered on August 21, 1989, and the petition for a writ of certiorari was filed on October 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of willfully attempting to evade taxes for the years 1980, 1981, and 1983, in violation of 26 U.S.C. 7201; one count of making a false claim against the government for income tax withheld in 1982, in violation of 18 U.S.C. 287; and six counts of willfully failing to file income tax returns for the years 1980, 1981, and 1983 through 1986, in violation of 26 U.S.C. 7203. Pet. App. 1-2. The court sentenced petitioner to imprisonment for one year and one day and probation for five years. It also ordered him to pay the costs of the prosecution, in the amount of $3,576.66. *Id.* at 18-19. The court of appeals affirmed. *Id.* at 1-15.

1. The evidence at trial showed that petitioner, an airline pilot, properly filed federal income tax returns for the years 1969 through 1979. Thereafter, he engaged in tax protest activity. He did not file returns for the years 1980 through 1986 (other than a frivolous return for 1982); he filed frivolous W-4 forms claiming an increasing number of withholding allowances, eventually claiming 60; and he then claimed on his W-4 form that he was completely exempt from taxation. Pet. App. 2; see Tr. 339-354.

Petitioner also filed civil suits against his employer, the Internal Revenue Service (IRS), and federal officials. For example, in March 1982, petitioner and another American Airlines employee sued the company and three of its employees for withholding federal taxes from his paycheck. On October 29, 1982, the district court dismissed the complaint as frivolous and ruled that the defendants' withholding of taxes from the plaintiffs' salaries was proper. Tr. 368-372.

In April 1982, petitioner sued the IRS in Tax Court, claiming, *inter alia*, that he was not a taxpayer or a "person," that his salary from American Airlines was not wages, that individuals are not subject to income taxation because the word "direct" does not appear in the Sixteenth Amendment, that he was not subject to taxation because he is a sovereign individual, and that the tax laws are ineffective because there is no enforcement clause in the Sixteenth Amendment. Tr. 583-594. During the trial in March 1984, the judge told petitioner that his arguments were frivolous and contrary to law and that courts across the country had consistently rejected them. Tr. 590-594.

Also in March 1984, a federal district court issued an opinion in a separate civil action brought by petitioner and four other persons against the United States and the Commissioner of Internal Revenue, in which the plaintiffs alleged that wages are not income and that the withholding of taxes from their wages and payment of those taxes to the government violated the Sixteenth Amendment. The district court dismissed the action and pointed out that the plaintiffs' argument that wages are not income had repeatedly been held to be without merit. Tr. 630, 634-635; see *Schaut* v. *United States*, 585 F. Supp. 137, 139 (N.D. Ill. 1984).

In yet another case, brought against various IRS defendants, the district court, in a decision dated June 16, 1986, not only found petitioner's position frivolous, but also fined him $10,000 for bringing the suit. Pet. App. 2; Tr. 677. The court imposed sanctions because petitioner had unsuccessfully raised essentially the same arguments in the previous action decided in March 1984. Tr. 678. The Seventh Circuit

found petitioner's abuse of the system "egregious" and fined him $1500 for bringing a frivolous appeal, but it reduced the district court's fine to $5000. *Cheek* v. *Doe*, 828 F.2d 395, 398, cert. denied, 484 U.S. 955 (1987).[1]

Two attorneys testified at trial that they had discussed the law of taxation with petitioner. Tr. 959-977, 997-1031. One testified that, beginning in 1981, she discussed constitutional issues of taxation with petitioner, who had done a great deal of research on the topic. She also testified that she told petitioner that laws are binding until they are overturned and warned him that his acts could "get him into trouble" and that he could "face a criminal prosecution." Tr. 971-977. The other attorney testified that he told petitioner that the courts had rejected as frivolous the claim that wages are not income. Tr. 1034-1035. He also told petitioner that one of the ways to attack the system from a constitutional standpoint was to sue for damages after the money has been withheld. Tr. 1018.

Petitioner testified, *inter alia*, that he spent a great deal of time researching this Court's decisions and that he was trying to obtain jurisdiction to test his beliefs in this Court. Tr. 1010-1013, 1205-1227. Petitioner also testified that he believed income taxes to be entirely voluntary and that because he had seen no decisions of this Court holding that wages are income, he believed that they are not. Tr. 1272, 1278.

2. a. The district court instructed the jury that, under the statutes under which petitioner was charged, the term "willfully" means "a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent." Pet. App. 20; Tr. 1684, 1688. The court continued (Pet. App. 3, 20):

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

The district court also gave an instruction (No. 53) on petitioner's theory of defense. The court drafted that instruction for petitioner, who represented himself at trial. It discussed, among other things, petitioner's claimed belief that he was not a taxpayer, that his wages did not constitute income, and that he was not required to file tax returns. Pet. App. 3, 21. The instruction also referred to a contention by petitioner "that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns." *Id.* at 21.

b. The jury began its deliberations on the morning of November 10, 1988. At 3:00 that afternoon, it sent out a note requesting a transcript of petitioner's testimony in which he discussed his beliefs. The court

[1] Petitioner also appeared at criminal tax trials of other persons. Pet. App. 2.

denied that request. Pet. App. 3. Later, at approximately 4:15 p.m., the jury sent out a second note, which stated in part (*Id.* at 23):

> We have a basic disagreement between some of us as to if [petitioner] honestly & reasonably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 [the defense instruction] is the one we cannot get by as to his belief.

During the ensuing discussion, the government pointed out that the court had omitted instructions that a person's opinion that the tax laws violate his constitutional rights and disagreement with the government's tax collection do not constitute good faith misunderstanding of the law. The court's response to the jury's note included those instructions. Pet. App. 4. The jury informed the court in another note at 7:10 p.m.: "We are divided on the issue as to if [petitioner] honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision." *Id.* at 24-25.

The jury returned on November 12, and the government requested the court to clarify its instructions before the jury resumed its deliberations. The court then gave the jury a second supplemental instruction. That instruction stated, *inter alia*, that "an honest but unreasonable belief is not a defense and does not negate willfulness," and that "advice or research resulting in a conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." Pet. App. 4, 25-26. The court also repeated its instructions that disagreement with the law is not a defense "because it is the duty of all persons to obey the law whether or not they agree with it," and that "[p]ersistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law." *Id.* at 26. The jury deliberated for another 2½ hours and then returned a verdict of guilty. *Id.* at 4-5.[2]

3. On appeal, petitioner contended, *inter alia*, that a misunderstanding of the law need not be objectively reasonable in order to negate willfulness.[3] Although

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[2] The jury submitted several notes that it wanted the court to read after the verdict was announced. Before reading the notes, the court polled the jury, and each juror affirmed that the guilty verdict was his or her own. Pet. App. 4-5. The court then read the notes. The first, signed by all 12 jurors, stated in part: "Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law." *Id.* at 27. The second note, from one of the jurors, stated: "I feel [petitioner] is a reasonable person and sincerely believes in his cause. * * * I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law." *Ibid.* The last note, from another juror, contained two phrases. The first read: " 'Honest and Sincere in His Cause'—He is *Guilty*." The second read: "Not 'Objectively Reasonable' He Is Guilty." *Ibid.* After reading these notes, the court polled the jury again, and no juror expressed disagreement with the verdict. *Id.* at 5-6.

[3] Petitioner also raised the following claims, all of which were rejected by the court of appeals: (1) that it was error

it recognized that other courts of appeals had reached a contrary result, the court below rejected petitioner's position, pointing out that, "in recent years," the court had "emphatically adhered to the 'objectively reasonable' standard." Pet. App. 6-7. In rejecting petitioner's further claim that the district court had erred in reinstructing the jury, the court of appeals also held that "the beliefs that wages are not income and that the tax laws are unconstitutional are not objectively reasonable as a matter of law." *Id.* at 9.

DISCUSSION

The district court's instruction that petitioner's asserted misunderstanding of the law must be objectively reasonable in order to negate willfulness was proper. As petitioner points out (Pet. 14-18), and as the court of appeals acknowledged (Pet. App. 6-7), however, the ruling below approving that instruction conflicts with the decisions of other courts of appeals. For that reason, and because the question presented is important to the fair and uniform enforcement of the criminal tax laws, we suggest that the Court grant the petition for a writ of certiorari.

1. The nature of the tax laws and of tax administration is such that a person should not be held to

---

for the district court to reinstruct the jury; (2) that the district court lacked subject matter jurisdiction; (3) that petitioner was denied his right to counsel because he "could not find trial counsel with expertise on the Constitution and the Internal Revenue Code" and because his "friends were only allowed to act as helpers during certain stages of the trial"; (4) that there was insufficient evidence of petitioner's intent to violate the law because a juror's note had said petitioner did not believe he was breaking the law; and (5) that the court had erred in rulings on the admissibility of evidence. Pet. App. 6-15. Petitioner does not renew those claims here.

have committed a willful violation, even where his conduct was intentional and he was generally informed about the requirements of the law, if his failure to file a return or pay a tax was based on a good faith error or misunderstanding arising under the tax laws and in an effort to comply with them, as long as the error or misunderstanding was objectively reasonable. But that exception to the usual rule that ignorance of the law is no excuse should not be stretched to include petitioner's obdurate refusal, in the face of repeated and explicit warnings, to acknowledge and conform to the most basic premises of the income tax laws—premises that are almost universally respected by millions of wage earners in the United States, that were respected by petitioner himself for a decade before he commenced the course of conduct at issue here, and that are essential to our system of taxation. Petitioner's adamant refusal to file any return or to pay any taxes in these circumstances was "willful," as a matter both of common usage and legal doctrine, despite his professed subjective "belief" that he did not have to comply.

This conclusion is supported by the Court's seminal decision in *United States* v. *Murdock*, 290 U.S. 389 (1933), regarding the meaning of "willfully" under the tax laws. The taxpayer in *Murdock* refused on Fifth Amendment grounds to give testimony and supply information regarding deductions he claimed in his tax returns because to do so would incriminate him with regard to possible violations of state statutes. He was charged with violating Section 1114(a) of the Revenue Act of 1926, ch. 27, 44 Stat. 116, which is identical in all pertinent provisions to 26 U.S.C. 7203. The trial court informed the jury of its view that the government had sustained the burden

of establishing guilt, and it refused to give the following instruction requested by the defendant (290 U.S. at 393):

> If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer questions was wilful.

The Court held that, in the circumstances presented, the trial court should have given the requested instruction and should not have commented on the evidence, because the term "willfully" in the statute meant more than voluntarily. 290 U.S. at 394-397. The Court explained (*id.* at 394-395):

> The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose * * *; without justifiable excuse * * *; stubbornly, obstinately, perversely * * *. The word is also employed to characterize a thing done without ground for believing it is lawful * * *, or conduct marked by careless disregard whether or not one has the right so to act.

This definition of willfulness has both subjective and objective components. For example, the standard of recklessness it incorporates—which is one of "careless disregard" for whether the law afforded the defendant the right to act in the way he did—furnishes an outer limit on the extent to which the defendant's subjective "belief" in the lawfulness of his conduct may negate the element of "willfulness." Moreover, the phrase "stubbornly, obstinately, perversely" aptly describes petitioner's conduct in this case, in the face of the courts' specific and repeated rejection of his legal objections. And of particular relevance in *Murdock* itself, the Court did not state that a willful act is a thing done without *believing* it lawful; the Court stated that a willful act is a thing done without *ground for believing* it lawful. Because the Court found that the state of the law with regard to whether one under examination in a federal tribunal could refuse to answer on account of probable incrimination under state law was not settled at the time the taxpayer acted, the Court held that "[t]he trial court could not * * * properly tell the jury the defendant's assertion of the privilege was so *unreasonable* and *ill-founded* as to exhibit bad faith and establish willful wrongdoing." 290 U.S. at 396 (emphasis added).

Petitioner's argument to the contrary is primarily based on the statements in *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), and *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976), that the term "willfully" in the tax laws means a "voluntary, intentional violation of a known legal duty." See Pet. 12, 13. There can be no doubt here, however, that petitioner's conduct was intentional. Nor can there be any doubt that he "knew" what his legal duties were, in the sense of knowing what was expected of him under the tax laws as they had been construed by the courts and were almost universally understood by other citizens. The criminal tax laws do not require that any more be shown. The decision below, requiring that any assertedly good faith error or misunderstanding of law in circumstances such as these at least be objectively reasonable, is therefore consistent with *Bishop* and *Pomponio* as well as *Murdock*.

The decision below also is consistent with the policies underlying the Court's articulation of standards of willfulness in the criminal tax laws. Section 7201 of the tax code, which the jury found that petitioner violated in all three years charged, is "the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). Congress's decision to confine criminal sanctions to willful violations reflects the practical reality that "the [tax] law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appears from the number who make overpayments." *Id.* at 496. Accordingly, "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Ibid.* This policy was reiterated in *Bishop*, where the Court stated that its "consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the wellmeaning, but easily confused, mass of taxpayers." 412 U.S. at 360-361.

There is no question, therefore, that an innocent or negligent oversight is not to be equated with willfulness. See, *e.g.*, *United States* v. *Aitken*, 755 F.2d 188, 191 (1st Cir. 1985). The instant case, and other similar cases decided by the Seventh Circuit, however, present a different issue. This case involves a deliberate refusal to comply with the basic requirements of the tax law (based on a wholly unreasonable view of that law), not an "innocent error" in the

application of its technical provisions. In these circumstances, a defendant who persists in obdurate refusal to acknowledge what the law is, *United States* v. *Davenport*, 824 F.2d 1511, 1518 (7th Cir. 1987), is no less culpable than a defendant who acknowledges what the law is but violates it because he disagrees with it.

The Seventh Circuit has implemented these principles by requiring that a taxpayer's mistaken belief about his legal duty be objectively reasonable in order to negate willfulness. See, *e.g.*, *United States* v. *Buckner*, 830 F.2d 102, 103 (7th Cir. 1987). This "reasonableness requirement is intended to give the jury a method by which they can distinguish between a bona fide misunderstanding of the law and obdurate refusal to acknowledge (present in so many tax protester cases) what the law indeed does require." *Davenport*, 824 F.2d at 1518 (quoting *United States* v. *Bressler*, 772 F.2d 287, 291 n.2 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986)). This approach is consistent with *Murdock*, which explicitly describes willful conduct as including that which is engaged in "stubbornly, obstinately, [or] perversely," "without ground for believing it is lawful." 290 U.S. at 394-395.

2. The Second Circuit has taken the same position as the Seventh Circuit on this issue. See *United States* v. *Schiff*, 801 F.2d 108, 112 (2d Cir. 1986), cert. denied, 480 U.S. 945 (1987) ("While we conclude that the 'basis' instruction did not impose an objective reasonableness test on Schiff's assertion of good faith, we also conclude that even if such a test had been imposed by the instruction, that would not have been error.").

As petitioner points out (Pet. 14-16), and as the court of appeals acknowledged (Pet. App. 6-7), how-

ever, other courts of appeals that have addressed this issue have held that a purely subjective test must be applied to a defendant's claimed "belief" that he does not have to file a return or pay income taxes on wages. Under that test, any good faith error or misunderstanding of law, no matter how unreasonable, negates the element of willfulness. See *United States* v. *Aitken*, 755 F.2d 188, 191-193 (1st Cir. 1985);[4] *United States* v. *Whiteside*, 810 F.2d 1306, 1310 (5th Cir. 1987); *United States* v. *Burton*, 737 F.2d 439, 441-442 (5th Cir. 1984); *United States* v. *Jerde*, 841 F.2d 818, 822 (8th Cir. 1988); *United States* v. *Phillips*, 775 F.2d 262, 263-264 (10th Cir. 1985).[5] Other courts have expressed a similar view, albeit without squarely addressing the precise situation and issue presented here. *Yarborough* v. *United States*, 230 F.2d 56, 61 (4th Cir.), cert. denied, 351 U.S. 969 (1956); *United States* v. *Sassak*, 881 F.2d 276, 279 (6th Cir. 1989); *Battjes* v. *United States*, 172 F.2d 1, 4 (6th Cir. 1949); *United States* v. *Mueller*, 778 F.2d 539, 541 (9th Cir. 1985); *Cooley* v. *United States*, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975).[6]

The courts whose decisions conflict with those of the Seventh Circuit have reached that result primarily by mechanical application of the Court's statement that "willfulness in this context simply means a voluntary, intentional violation of a known legal

[4] See also *United States* v. *Hogan*, 861 F.2d 312, 316 (1st Cir. 1988).

[5] See also *United States* v. *Hairston*, 819 F.2d 971, 972-973 (10th Cir. 1987).

[6] But see *United States* v. *Aguilar*, 871 F.2d 1436, 1449-1450 & nn.5, 6 (9th Cir. 1989).

duty." *Pomponio*, 429 U.S. at 12. None has addressed the language in *Murdock*, quoted above, that speaks directly to the present situation, or acknowledged that a person in petitioner's position "knows" his legal duty within the meaning of the *Pomponio* formulation, even if he does not subjectively "believe" it.[7]

The conflict among the courts of appeals regarding the propriety of an instruction requiring that the defendant's error or misunderstanding of law be objectively reasonable warrants resolution by this Court. The vexing issue of how to apply the element of willfulness in this setting is one of recurring importance, as evidenced by the number of "tax protester" cases in which the issue has arisen in recent years. See Pet. 16-18. The issue is important to the

[7] Even the courts that adhere to a purely subjective standard permit the finder of fact to take into consideration the reasonableness of a claimed belief in determining whether the defendant actually acted in good faith or intended to violate the law. See *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986); *United States* v. *Whiteside*, 810 F.2d at 1310-1311; *Cooley* v. *United States*, 501 F.2d at 1253 n.4; *United States* v. *Payne*, 800 F.2d 227, 229 (10th Cir. 1986).

In addition, the courts uniformly have held that a disagreement with the law or a belief that it is unconstitutional does not negate willfulness. See *United States* v. *Turano*, 802 F.2d at 11; *United States* v. *Schiff*, 801 F.2d at 112; *United States* v. *Snyder*, 766 F.2d 167, 170 (4th Cir. 1985); *United States*, v. *Whiteside*, 810 F.2d at 1311; *United States* v. *Burton*, 737 F.2d at 442; *United States* v. *Sassak*, 881 F.2d at 281; *United States* v. *Grumka*, 728 F.2d 794, 797 (6th Cir. 1984); *United States* v. *Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980), cert. denied, 451 U.S. 942 (1981); *United States* v. *Ness*, 652 F.2d 890, 893 (9th Cir.), cert. denied, 454 U.S. 1126 (1981); *United States* v. *Harrold*, 796 F.2d 1275, 1282-1283 (10th Cir. 1986), cert. denied, 479 U.S. 1037 (1987).

fair and uniform enforcement of the tax laws in an additional sense as well, because it concerns the standards to which all citizens will be held with respect to their duty to act in accordance with the most fundamental and universally applicable premises of our tax system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1990

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No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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The Judgment and Commitment Order of the District Court is included in the Petition for Certiorari as Appendix B.

The Opinion of the Court of Appeals for the Seventh Circuit affirming the conviction is reported at 882 F.2d 1263 (7th Cir. 1989), and is included in the Petition for Certiorari as Appendix A.

The Order of the Court of Appeals for the Seventh Circuit staying the mandate is included in the Petition for Certiorari as Appendix F.

No. 89-658

In The

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JOHN L. CHEEK,

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THE UNITED STATES OF AMERICA,

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT

(title omitted in printing)

03/09/87

1 Filed indictment (Dkt'd 03/18/87).

04/14/87

8 Order own recognizance bail set in the amount of $4,500.00 (Enter Pretrial Release order. (Draft) Defendant allowed to travel throughout the Continental U.S.) (JUDGE PLUNKETT) (Dkt'd 04/15/87).

10 Defendant enters plea of not guilty (Counts 1-7) (Defendant appears without counsel. Court enters a plea for defendant.) (JUDGE PLUNKETT) (Dkt'd 04/16/87).

09/14/87

79 Filed superseding indictment (Dkt'd 09/29/87).

09/18/87

83 Arraignment held (Counts S1-S10) (JUDGE PLUNKETT) (Dkt'd 09/29/87).

83 Defendant enters plea of not guilty (Counts S1-S10) (Court will make oral findings on all pending motions before the scheduled trial date.) (JUDGE PLUNKETT) (Dkt'd 09/29/87).

10/26/87

94 Trial begins-jury (Counts S1-S10) (JUDGE PLUNKETT) (Dkt'd 10/29/87).

11/12/87

128 Jury verdict of guilty (Counts S1-S10) (JUDGE PLUNKETT) (Dkt'd 11/16/87).

02/02/88

141 Motion for judgment of acquittal denied (MOT#40) (Defendant's motion for a new trial is denied. For further detail see order on the reverse of the original minute order form.) (JUDGE PLUNKETT) (Dkt'd 02/04/88).

03/16/88

149 Sentencing of defendant (Counts S1-S10) (The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND ONE (1) DAY on each of the Counts 1, 3 and 5. Said sentence on Counts 1, 3, 5 to run concurrently with each other. IT IS ADJUDGED that on each of Counts 2, 4, and 6 through 10 the defendants is placed on probation for a period of FIVE (5) YEARS, on condition that he comply with the general conditions of probation. Said sentence on Counts 2, 4 and 6 through 10 to run concurrently with each other and consecutively with the sentence imposed on Counts 1, 3 and 5. IT IS FURTHER ORDERED that the following conditions be imposed on probation: 1. defendant make his best efforts to pay back taxes, interests and penalties and to file future income tax returns on a timely basis. 2. defendant to submit to an examination under oath with regards to his assets, by March 23, 1988. IT IS FURTHER ORDERED that defendant pay a mandatory assessment for the costs of prosecution in the amount of $3,576.66. IT IS FURTHER ORDERED pursuant to 18 U.S.C. Section 3013(a) that the defendant is assessed the sum of $25.00 on each of Counts 7, 8, 9 and 10 and the sum of $50.00 on each of Counts 1, 3, 5 and 6 for a total assessment of

$300.00 IT IS FURTHER ORDERED that imposition of sentence is stayed pending appeal.) (JUDGE PLUNKETT) (Dkt'd 03/22/88).

03/21/88

150 Order filed (Sentencing order dated March 16, 1988 is amended as follows: Defendant is sentenced on Superseding Counts S1-S10. Original counts of Indictment are dismissed on oral motion of government.) (JUDGE PLUNKETT) (Dkt'd 03/22/88).
Dismissed on government's motion (Counts 1-7) (Dkt'd 03/22/88).

03/22/88

152 Filed notice of appeal (Counts S1-S10) (APPL#1) (Dkt'd 03/23/88).

154 Order conditions of bond modified (Defendant's bond is enlarged to allow defendant to travel, for work, throughout the country.) (JUDGE PLUNKETT) (Dkt'd 03/23/88).

SUPERCEDING INDICTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 87 CR 161
v.	)	Violations: Title 26, United States Code, Sections 7201 and 7203; Title 18, United States Code, Section 287
JOHN L. CHEEK	)	(Filed Sept 14, 1987)

The SPECIAL DECEMBER 1986 GRAND JURY charges:

1. During the calendar year 1980, defendant JOHN L. CHEEK a resident of Elk Grove Village, Illinois, had and received a gross income of approximately $45,855.74 and had a taxable income of approximately $39,915.

2. Upon said taxable income, defendant JOHN L. CHEEK, owed to the United States of America income tax of approximately $10,090 in addition to the $2,524.57 previously withheld from his wages.

3. Defendant JOHN L. CHEEK was required by law on or before April 15, 1981, to make an income tax return to the Internal Revenue Service and to pay such additional income tax.

4. Well knowing the foregoing facts, beginning on or about April 17, 1980 and continuing thereafter until the date of this indictment, in the Northern District of Illinois, Eastern Division, and elsewhere,

JOHN L. CHEEK,

defendant herein, did wilfully and knowingly attempt to evade and defeat said income tax due and owing to the United States for said calendar year by many and diverse acts including:

(a) By failing to make such income tax return on or before April 15, 1981 to the Internal Revenue Service and by failing to pay said income tax due and owing to the Internal Revenue Service; and

(b) By supplying to his employer, American Airlines an Employees Withholding Allowance Certificate (IRS Form W-4), dated April 17, 1980, in which he falsely claimed 39 withholding allowances, to which number of allowances he was not entitled, for the purpose of reducing or eliminating any withholding from his income;

(c) By supplying to his employer, at Chicago, Illinois, a signed Form W-4 in which he falsely claimed 60 withholding allowances, to which number of allowances he was not entitled, for the purpose of reducing or eliminating any withholding from his income; and

(d) By making a claim on IRS Form 843 on approximately January 12, 1981 for refund of $2,524.57 withheld during 1980;

In violation of Title 26, United States Code, Section 7201.

COUNT TWO

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

During the calendar year 1980, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEK

defendant herein, who was a resident of Elk Grove, Illinois, had and received a gross income of approximately $45,855.74; by reason of such income he was required by law, following the close of the calendar year 1980 and on or before April 15, 1981, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, in the Northern District of Illinois, Eastern Division, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; well knowing all of the foregoing facts, he willfully did fail to make the required income tax return to that District Director of Internal Revenue, to that Director of the Internal Revenue Service Center, or any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT THREE

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

1. During the calendar year 1981, defendant JOHN L. CHEEK, a resident of Elk Grove, Illinois, had and received a gross income of approximately $46,155 and had a taxable income of approximately $40,930.

2. Upon said taxable income, defendant JOHN L. CHEEK, owed to the United States of America income tax of approximately $12,342 in addition to the $603.88 previously withheld from his wages.

3. Defendant JOHN L. CHEEK was required by law on or before April 15, 1982, to make an income tax return to the Internal Revenue Service and to pay such additional income tax.

4. Well knowing the foregoing facts, beginning on or about January 1, 1981, and continuing thereafter until the date of this indictment, in the Northern District of Illinois, Eastern Division, and elsewhere,

JOHN L. CHEEK

defendant herein, did wilfully and knowingly attempt to evade and defeat said income tax due and owing to the United States for said calendar year by many and diverse acts including:

(a) By failing to make such income tax return on or before April 15, 1982 to the Internal Revenue Service and by failing to pay said income tax due and owing to the Internal Revenue Service; and

(b) By supplying to his employer, American Airlines, signed Employees Withholding Allowance Certificates (Form W-4), dated January 1, 1981 and February 10, 1981 in which he falsely claimed he was exempt from withholding tax;

(c) By mailing his employer American Airlines, from the Northern District of Illinois, on approximately January 6, 1981 and January 19, 1981, letters and affidavits to prevent withholding of income taxes;

(d) By mailing a letter to his employer, American Airlines on approximately August 14, 1981, directing American Airlines to honor his claim of exemption from withholding;

(e) By submitting a claim and attached Internal Revenue Service Form 1040 for full refund of all federal taxes withheld from his 1981 wages.

In violation of Title 26, United States Code, Section 7201.

COUNT FOUR

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

During the calendar year 1981, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEK

defendant herein, who was a resident of Elk Grove, Illinois, had and received a gross income of approximately $46,155.20; by reason of such income he was required by law, following the close of the calendar year 1981 and on or before April 15, 1982, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, in the Northern District of Illinois, Eastern Division, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; well knowing all of the foregoing facts, he willfully did fail to make the required income tax return to that District Director of Internal Revenue, to that Director

of the Internal Revenue Service Center, or any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT FIVE

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

On or about April 15, 1983, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEK

defendant herein, did make and present to the Internal Revenue Service, an agency of the United States, a claim for refund of federal income taxes withheld for 1982, in the amount of $16,080, knowing his claim in that amount to be false and fraudulent;

In violation of Title 18, United States Code, Section 287.

COUNT SIX

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

1. During the calender year 1983, defendant JOHN L. CHEEK, a resident of Elk Grove, Illinois, had and received a gross income of approximately $61,738 and had a taxable income of approximately $56,175.

2. Upon said taxable income, defendant JOHN L. CHEEK, owed to the United States of America income

tax of approximately $14,681 in addition to the $2,879.66 previously withheld from his wages.

3. Defendant JOHN L. CHEEK was required by law on or before April 15, 1984, to make an income tax return to the Internal Revenue Service and to pay such additional income tax.

4. Well knowing the foregoing facts, beginning on or about January 1, 1983 and continuing thereafter until the date of this indictment, in the Northern District of Illinois, Eastern Division, and elsewhere,

JOHN L. CHEEK,

defendant herein, did wilfully and knowingly attempt to evade and defeat said income tax due and owing to the United States for said calendar year by many and diverse acts including:

(a) By failing to make such income tax return on or before April 15, 1984 to the Internal Revenue Service and by failing to pay said income tax due and owing to the Internal Revenue Service;

(b) By supplying to his employer, American Airlines, signed Employees Withholding Allowances Certificates (Form W-4), dated January 1, 1983 and February 12, 1983 and February 20, 1983, in which he falsely claimed he was exempt from withholding tax;

(c) By using the Mid-American Commodity and Barter Association as a depository and conduit for his income;

(d) On approximately October 4, 1983 and November 2, 1983, by threatening to sue individuals of American Airlines for complying with Internal Revenue Service requirements;

(e) By issuing a letter of demand on American Airlines on approximately January 6, 1984 for $1,408 withheld during 1983;

(f) By making claims for refunds of 1983 taxes withheld and threatening civil rights suits in letters to the Internal Revenue Service on approximately April 2, 1985 and October 26, 1985.

In violation of Title 26, United States Code, Section 7201;

COUNT SEVEN

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

During the calendar year 1983, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEK

defendant herein, who was a resident of Elk Grove, Illinois, had and received a gross income of approximately $61,738; by reason of such income he was required by law, following the close of the calendar year 1983 and on or before April 15, 1984, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, in the Northern District of Illinois, Eastern Division, or to the Director,

Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; well knowing all of the foregoing facts, he willfully did fail to make the required income tax return to that District Director of Internal Revenue, to that Director of the Internal Revenue Service Center, or any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT EIGHT

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

During the calendar year 1984, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEK

defendant herein, who was a resident of Elk Gove [sic], Illinois, had and received a gross income of approximately $75,145.00; by reason of such income he was required by law, following the close of the calendar year 1984 and on or before April 15, 1985, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, in the Northern District of Illinois, Eastern Division, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; well knowing all of the foregoing facts, he willfully did fail to make the required

income tax return to that District Director of Internal Revenue, to that Director of the Internal Revenue Service Center, or any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT NINE

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

During the calendar year 1985, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEK,

defendant herein, who was a resident of Elk Grove, Illinois, had and received a gross income of approximately $80,928.00; by reason of such income he was required by law, following the close of the calendar year 1985 and on or before April 15, 1986 to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, in the Northern District of Illinois, Eastern Division, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; well knowing all of the foregoing facts, he willfully did fail to make the required income tax return to that District Director of Internal Revenue, to that Director of the Internal Revenue Service Center, or any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

COUNT TEN

The SPECIAL DECEMBER 1986 GRAND JURY further charges:

During the calendar year 1986, in the Northern District of Illinois, Eastern Division,

JOHN L. CHEEEK [sic],

defendant herein, who was a resident of Elk Grove, Illinois, had and received a gross income of approximately $83,828.00; by reason of such income he was required by law, following the close of the calendar year 1986 and on or before April 15, 1987, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, in the Northern District of Illinois, Eastern Division, or to the Director, Internal Revenue Service Center, Midwest Region, Kansas City, Missouri, stating specifically the items of his gross income and any deductions and credits to which he was entitled; well knowing all of the foregoing facts, he willfully did fail to make the required income tax return to that District Director of Internal Revenue, to that Director of Internal Revenue Service Center, or any other proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

A TRUE BILL:

/s/ Milton Stennis
FOREPERSON

/s/ Anton Valukas
UNITED STATES ATTORNEY

EXCERPTS FROM THE TRIAL EVIDENCE

(p. 368) DIRECT EXAMINATION (Continued)[1]

BY MR. HEINZE:

Q. Mr. Thomson, just before we broke yesterday afternoon, you told the jury that some time after receiving a note from John Cheek that threatened to sue the person responsible for withholding from his paycheck you were sued by him. Is that correct?

A. That's correct.

Q. And did you testify that he sued you as an individual?

A. Yes, he did.

Q. And do you remember about when it was that you were sued by Mr. Cheek?

A. 1982.

Q. Okay. Do you remember if it was early in the year, late in the year –

A. Early on. March '82.

Q. What happened to the lawsuit that Mr. Cheek brought against you?

A. Well, it was some time after the appeal process had expired, I believe it was January '84, I was notified by American's legal department that the case had been dismissed as a frivolous action.

(p. 369) Q. Did you receive a copy of the opinion that the Judge had written in the case?

[1] Page references are to the trial transcript.

A. Yes, I did.

Q. I am handing you now what has been marked Government Exhibit American 9. Would you identify that.

A. Yes. It is the document I received in January '83 pertaining to that, the outcome of that case.

Q. Okay, and who is this letter from?

A. Glenn Walker.

Q. Who is Glenn Walker?

A. An American Airlines attorney.

Q. Okay, and did you receive a copy of this letter in your department?

A. Yes, I did.

Q. Has this letter been kept in the ordinary course of American's business?

A. Yes, it has.

MR. HEINZE: Your Honor, I would move that American Exhibit 9 be admitted into evidence.

THE COURT: Mr. Cheek, is there any objections to 9?

MR. CHEEK: I would like to see it. Were we given a copy of that yesterday?

MS. SAFFORD: No –

MR. HEINZE: Judge, he received a copy of this some time ago. This was the last exhibit that I showed to

him, but (p. 370) we didn't get beyond my actually handing it to him yesterday afternoon.

MR. CHEEK: No objection.

THE COURT: All right, it will be received.

BY MR. HEINZE:

Q. And what is the date of this letter, sir?

A. January 26, 1983.

Q. And you said you received a copy of this, is that right?

A. That's correct.

Q. Who is this addressed to?

A. Mr. T. F. Quinn, Jr.

Q. Okay, and would you read the first paragraph of this letter.

A. (Reading:)

"Here is the federal court's opinion in Cheek and Hall versus American Airlines, dismissing the complaint and concluding that plaintiff's complaints appear to be frivolous. Defendants' actions in withholding taxes from the plaintiffs' salaries are proper. Time for appeal has now passed."

Q. Okay. Was that portion you just read about plaintiff's complaints appeared to be frivolous and the defendant's actions being proper a quotation?

A. Yes, it was.

Q. Okay, and what is attached to this letter?

A. It's a court order.

(p. 371) Q. Okay, and at the top of the first page of the court order, does it identify what court this lawsuit was in?

A. In the United States District Court for the Northern District of Illinois, Eastern Division.

Q. Does it also say who the plaintiffs in this action were?

A. The plaintiffs are indicated as Robert C. Hall and John L. Cheek.

Q. And who are the defendants?

A. American Airlines, T. F. Quinn, Jr., M. H. Walsh and J. D. Thomson.

Q. All right. Then turning to the third page of this order, is that the final page of the order?

A. Yes, it is.

Q. And is it signed?

A. Yes, it is.

Q. And by whom is it signed?

A. It looks like Williams T. Hart, United States District Judge.

Q. Okay. What is the date on this order?

A. October 29, 1982.

Q. And could you just read the first paragraph of this last page.

A. (Reading:)

"Finally, plaintiffs' complaints appear to be frivolous. The defendants' actions in withholding (p. 372) taxes from the plaintiffs' salaries are proper. Accordingly, the defendants' motions for summary judgment are granted and each case is dismissed with prejudice."

* * *

(p. 583) *WILLIAM E. BOGNER*, called by the government, previously affirmed.

DIRECT EXAMINATION (Continued)

BY MS. SAFFORD:

Q. Mr. Bogner, when we broke for lunch I had just asked you questions relating to a transcript in the tax court proceeding on March the 6th, 1984. Do you have that exhibit before you?

A. Yes, I do. That is Court Exhibit 3-A.

Q. Now, I was just about to ask you, and let me now ask you the question, during the course of the trial did Mr. Cheek put forward various arguments relating to tax matters?

A. Yes, he did. Extensively.

(p. 584) Q. Now, did he introduce an argument as to whether he was a taxpayer subject to the Internal Revenue tax?

A. Yes, he did.

Q. I am going to direct your attention, please, to page 15 of the transcript and ask that you read the transcript beginning at line 16 of page 15 with the notation that Mr. Cheek is speaking. Would you go ahead, please, and read through line 24.

A. You will have to bear with me, Miss Safford. Some of the pages aren't numbered. I think I have it. It starts out with "All right"?

Q. That's correct.

A. "All right – "?

Q. Who is speaking?

A. Mr. Cheek is speaking. (Reading:)

"All right. With all due respect to you, Judge Parker, I would like to read you the term 'taxpayer,' which I am challenging. It is 7701(a)14:

" 'The term "taxpayer" means any person subject to any internal revenue tax,' and I have stated for the record that I am challenging the fact that I am a taxpayer. I have stated for the record that I am in the wrong court."

Q. And did the Court respond?

A. (Reading:)

(p. 585) "Your argument is frivolous. Now proceed."

Q. Did Mr. Cheek make an argument as to whether he was a person or individual as described in the internal revenue laws?

A. Yes, he did.

Q. All right. Directing your attention, please, to page 16, beginning at line 1, the new sentence which begins with the word "Person –" Is that Mr. Cheek speaking?

A. Yes, that is Mr. Cheek speaking.

Q. Would you read, please, from line 1 through line 8.

A. (Reading:)

"Person. 'The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.'

"I would like to state for the record that I am not the person described by 7701(a)(1) as far as – "

Q. And then did the Court speak?

A. Then the Court said:

"Mr. Cheek, that is a frivolous argument, and you are a person and you are a taxpayer. Now proceed with the tax issues that are before the Court."

Q. Did Mr. Cheek during the course of the proceedings make an argument that the payment he received from American Airlines was not wages within the meaning of the Internal Revenue Code?

A. Yes, he did.

(p. 586) Q. All right. Now would you turn, please, to page 17, line 5 and read from line 5 the new sentence that begins there, through line 17.

A. That begins with the number "3401"?

Q. That's correct. Who is speaking?

A. Mr. Cheek.

Q. What did Mr. Cheek say?

A. (Reading:)

"3401(a), 'Wages. For purposes of this chapter the term "wages" means all enumeration – ' "

Q. And is that supposed to be "remuneration"?

A. I believe it is. (Reading:)

" '. . . .for services performed by an employee for his employer.' I would like to state for the record that I don't make wages. I, incorrectly, in past documents, used the word 'wages.'

"In all future, and if you are allowed to amend on the record, statements, I would like to substitute the word 'pay' or 'paycheck' for the word 'wages,' because wages are compensation that are made by an employee. I am not an employee.

"An employee is a public servant or an officer of a corporation. I do not qualify for that position."

Q. And what did the Court say?

A. (Reading:)

(p. 587) "Mr. Cheek, your position is utterly frivolous."

Q. Would you turn then, please, to page 18, lines 20 through 25. Did the Court continue?

A. Yes, she did.

Q. And what did the Court say?

A. (Reading:)

"Well, I understand the issue very well, because I have heard this argument time and time again from many taxpayers throughout the country, and it is a frivolous argument."

MR. CHEEK: Object. That's not page 18, it –

MS. SAFFORD: All right. I'm sorry. We marked copies, but I didn't mark mine.

BY MS. SAFFORD:

Q. Would you start, please, at line 17.

A. Was I on page 18?

Q. On page 18 at line 17. I'm sorry.

A. Where Mr. Cheek is speaking?

Q. Yes.

A. And how far should I go?

Q. From 17 to the bottom of the page, then lines 1 through 4 on page 19.

A. And beginning on line 17?

Q. That's correct.

A. Mr. Cheek is speaking. (Reading:)

(p. 588) "I don't think I will prove anything to you because I don't think you understand the issue, and I don't think you are an impartial decisionmaker."

Q. And what did the Court state?

A. (Reading:)

"Well, I understand the issue very well because I have heard this argument time and time again from many taxpayers throughout the country, and it is a frivolous argument."

Q. And then Mr. Cheek?

A. Mr. Cheek said:

"I have just informed you I am not a taxpayer."

Q. And the Court?

A. (Reading:)

"Well, I am sorry, Mr. Cheek, but you are in error."

Q. Did Mr. Cheek also make an argument during the course of the proceedings that the tax didn't apply to individuals because the word "direct" doesn't appear in the Sixteenth Amendment?

A. Yes, he did.

Q. And would you turn your attention, please, to page 23 – Can you find it?

A. Yes.

Q. – to line 19.

(p. 589) A. Beginning with –

Q. Excuse me. Beginning with line 8, Mr. Cheek speaking.

A. How far should I go?

Q. From line 8 to the bottom of the page and then through the first two lines of page 24.

A. I'm sorry. Line 8?

Q. Yes, that's right.

A. (Reading:)

"From the Constitution of the United States, ratified February 3, 1913: 'The Congress shall have power to levy and collect taxes on income, from whatever source derived, without apportionment, among the several states, and without regard to any sense of their enumeration [sic].'

"I would like to state for the record that Congress, our friends in Washington, proposed the Sixteenth Amendment without the word 'direct' on July 31, 1909. Since a constitutional amendment is not a constitutional amendment until it is ratified, according to Article V of the Constitution, by three-quarters of the states, it became the Sixteenth Amendment on February 3, 1913.

"I would like to emphasize for the record the word 'direct' is missing. The Congressional Record indicates that the Senate, and I think, if you will (p. 590) study the record, I think you will also find that the House discussed putting 'direct' in the Sixteenth Amendment."

Q. And what did the Court respond to Mr. Cheek is regard to that?

A. (Reading:)

"Mr. Cheek, this argument is utterly frivolous. It has been considered by this Court and other courts and consistently rejected. You are wasting your time."

Q. And did Mr. Cheek also advance the argument that income taxes are an excise tax?

A. Yes, I believe he did.

Q. All right, and, directing your attention to the bottom of page 24, line 24 – excuse me – yes, line 24 and through 25, and then on the following page through line 7, would you read there, please.

Who is speaking?

A. Mr. Cheek is speaking. You said beginning at line 24?

Q. Yes.

A. (Reading:)

"I would like to emphasize for the record that the Sixteenth Amendment defined 'income' as an excise tax, that that didn't extend the taxing power of the Constitution or Congress."

(p. 591) Q. And what did the Court state?

A. "You are wrong, Mr. Cheek."

Q. What did Mr. Cheek state?

A. "From what the Supreme Court said in those decisions."

Q. And what did the Court state?

A. "You are misconstruing those decisions, and this Court is quite familiar with them. Proceed."

Q. Did Mr. Cheek advance the argument that the income tax was a temporary tax put in place during World War II?

A. Yes. Yes, he said that.

Q. All right. Directing your attention to the bottom of page 25, lines 22 through 25, and the beginning of page 26, lines 1 through 6. Would you please read there.

A. Yes. This is Mr. Cheek speaking:

"Public Law, October 21, 1942, it is 56 Statutes at Large, 884, Section 172, temporary tax on individuals, victory tax on individuals.

"I would like to state for the record, if we have got an income tax on individuals, why do we need a victory, temporary tax on individuals?"

Q. And what did the Court state?

A. "Mr. Cheek, that is an utterly frivolous argument. It has been considered by this Court and rejected in numerous cases, and I am not going to plow through that again."

Q. Did he make the argument or advance the argument that he (p. 592) doesn't make income when he exchanges his labor for his wages?

A. Yes, he did.

Q. And directing your attention, please, to page 27, would you read lines 21 through 25.

A. This is the Court speaking:

"The Internal Revenue Code taxes income from all sources. Now let's proceed."

Q. And what did Mr. Check state?

A. (Reading:) (Transcribed as spoken)

"I have no argument to Internal Revenue Code taxes income; my argument is I don't make income when I exchange my life for contract."

Q. And what did the Court state at the top of page 28?

A. "That is an utterly frivolous argument."

Q. Did Mr. Cheek make the argument that he was not subject to income tax because he is a sovereign individual?

A. Oh, yes, yes, he said that.

Q. Okay. Directing your attention, please, to page 44, line 23, beginning with, "Since I am a sovereign –" and continuing through page 45, line 1.

A. Now, page 44, line 23?

Q. Yes.

A. And going how far?

Q. To the top, line 1, the first sentence.

A. Okay. This is Mr. Cheek speaking now:

(p. 593) "Since I am a sovereign individual, I have – I strongly object to this violation of administrative procedures, which denies due process."

Q. And what did the Court state?

A. "Your objections are frivolous."

Q. Did he make the argument that wages are not taxable because he doesn't work for an employer?

A. Yes.

Q. Now would you direct your attention, please, to page 69, lines 20 through 25. What did Mr. Cheek say?

A. Lines 20 through 25?

Q. Yes.

A. Mr. Cheek speaking:

"I deny the use of the word 'wages.' "

Q. What did the Court say in response?

A. (Reading:)

"You may deny it, but you are an employee of American Airlines, and they pay your wages, and it is taxable income. Now, you can call it apple pie if you wish, but that does not change the legal characterization of it."

Q. Did he make the argument on that day, March of 1984, that the income tax laws are ineffective because there is no enforcement clause in the Sixteenth Amendment?

A. Yes, he said that also.

(p. 594) Q. All right. I direct your attention, please, to page 72.

A. What line?

Q. Lines 8 through 11.

A. All right.

Q. Or, excuse me, lines 1 –

A. The first line there on the page?

Q. Yes.

A. Mr. Cheek speaking:

"Could I ask why the enforcement clause is missing from the Sixteenth Amendment?"

Q. And what did the Court respond?

A. "That is frivolous, and you have been through that once before."

* * *

(p. 629) MR. HEINZE: Your Honor, at this point the government would offer into evidence Government Exhibit Court 4, which is a certified copy of certified records from the United States District Court, Northern District of Illinois, certified by the clerk of the court.

(p. 630) This relates to case No. 82 C 2304. The plaintiffs in the suit were Charles D. Schaut, Albert Reich, John Cheek, Norman Krah and Michael Smith.

The last names there, Schaut is spelled S-c-h-a-u-t; Reich is spelled R-e-i-c-h; Cheek is the common spelling; Krah is K-r-a-h; and Smith is the common spelling.

The defendant in the case is the Commissioner of Internal Revenue. Then the certified copies of records are

the docket sheet from the lawsuit, the complaint for injuctive and declaratory relief filed by the plaintiffs, a copy of the memorandum opinion issued by the Court on March 8, 1984, and the Judge was Abraham Lincoln Marovitz.

Then there are some attachments to that which also came in the file, which are copies of letters sent to Mr. John Cheek, Norman Krah and to Michael Smith from the Director of the Service Center at Kansas City.

THE COURT: Is there any objection to these documents?

MR. CHEEK: I have no objection if I can introduce parts of the record when it is my turn.

THE COURT: Well, anything that is part of the court record, if it is relevant, will certainly be admitted. These are received.

MR. HEINZE: Your Honor, at this time I would ask to be able to read portions of the memorandum opinion to the jury.

MR. CHEEK: No objection.

(p. 631) MR. HEINZE: As I said, this is an opinion issued by Judge Marovitz, dated March 8, 1984 – well, actually, first of all, I will go to the complaint for injunctive and declaratory relief filed by the parties. Paragraph 1 states:

"Jurisdiction and venue. This is an action brought pursuant to the Declaratory Judgment Act, 28 USC, Section 2201, concerning claims of violations of the Fifth and Sixteenth Amendments to the Constitution of the United States."

Paragraphs 3 and 4 are entitled "Parties." (Reading:)

"The plaintiffs, Charles D. Schaut, Albert Reich, John Cheek and Norman Krah, are wage earners employed in this district."

Then, No. 4:

"The defendant, the United States of America, and the Commissioner of the Internal Revenue Service are responsible for the enactment of the Internal Revenue Code, Title 26, USC Sections 9042."

That complaint was filed on April 15, 1982, or dated that, April 15, 1982.

Turning then to the memorandum opinion issued by Judge Marovitz, it is entitled "Memorandum Opinion to Motion to Dismiss." It begins on page 1. (Reading:)

"Plaintiffs Charles D. Schaut, Albert Reich, (p. 632) John Cheek, Norman Krah and Michael H. Smith bring this action pro se against the United States of America and the Commissioner of the Internal Revenue Service, alleging that the withholding of taxes from their wages and the payment of these taxes is in violation of the authority granted under the Sixteenth Amendment to the United States Constitution. Plaintiffs seek injunctive and declaratory relief."

On page 2 the opinion states:

"According to the complaint, the plaintiffs are all wage earners who are employed within this judicial district, and have been subject to both the payment of income taxes and the withholding of taxes from their

wages. Plaintiffs claim that wages are not taxable under the Sixteenth Amendment, and, thus, the withholding from and the payment of taxes from their wages violate their Fifth Amendment due process rights. Plaintiffs request that the Court declare that they are not subject to being taxed by the Internal Revenue Code because they are wage earners and thus not subject to income tax provisions. Plaintiffs also request that the Court enjoin defendants from subjecting plaintiffs to withholding taxes."

The opinion continues on page 4 under the heading (p. 633) "Anti-Injunction Act." (Reading:)

"Plaintiffs ask the Court to enter an injunction restraining defendants from subjecting their wages to withholding taxes. 26 USC 7421(a), commonly known as the Anti-Injunction Act, provides as follows:

"(a) Tax. Except as provided in Sections 6212(a) and - (c), 6213(a), 6672(b), 6694(c), 7426(a) and - (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

"The principal purpose of the act is 'the protection of the government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for a refund.' "

There is a citation to Bob Jones University vs. Simmon, 416 US 725-726, 1974. (continuing reading:)

"The Supreme Court has fashioned a limited exception to the act's rule prohibiting injunctive relief. In the case Enos vs. Williams Packing Company, 370 US 1, 1962, the Court conditioned an injunction on tax collection or assessment upon meeting a (p. 634) two-fold test, (1), if it is clear that under no circumstances the United States could ultimately prevail on the merits of the claim, and, (2), if equity jurisdiction otherwise exists.

"Plaintiffs have not alleged any facts to support equity jurisdiction. There is no showing of irreparable injury or wrongful conduct on defendants' part," with a citation to the case of Schaffer, 515 Fed Sup 748-752, "nor can this Court say that under no circumstances could the United States ultimately prevail on the merits in this action. Plaintiffs' whole suit is premised upon their theory that wages are not income because the value of their labor is the same as the payment they receive for it, and, thus, they realize no gain.

"This argument has repeatedly been held to be without merit."

That is followed by citations to some other cases.

At the bottom of page 5 the decision continues:

"Declaratory Judgment Act. 28 USC 2201 provides that in a case of actual controversy within its jurisdiction, except with respect to federal taxes, other than actions brought under Section 7428 of the Internal Revenue Code of 1954, or proceeding under Section 505 or 1146 of Title 11, 'any court of the (p. 635) United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party

seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.' Emphasis added," and that relates to the underlining of the word " 'except with respect to federal taxes.' "

The opinion goes on:

"It is clear from the express wording of the act that it does not apply to controversies concerning federal taxes. The reasoning applicable to the Anti-Injunction Act applies with equal force to the Declaratory Judgment Act. Schaffer, 515 Fed Sup at 752, 'The congressional antipathy for premature interference with the assessment or collection of any federal tax also extends to declaratory judgments.' " Citation, Bob Jones University, 416 US at 732, Note 7.

The opinion ends, "Accordingly, defendants' motion to dismiss is granted," and it is signed Judge Abraham Lincoln Marovitz, and dated March 8, 1984.

* * *

(p. 675) MS. SAFFORD: This is in the United States District Court for the Northern District of Illinois, Eastern Division, John L. Cheek, Plaintiff, versus John Doe, Thomas Ludwig, James R. Starkey, Defendants, No. 85 C 10351.

"Memorandum Opinion and Order. Plaintiff challenges the constitutionality of the income tax and

seeks reimbursement for taxes withheld from his (p. 676) wages. The case is before the Court on the defendant's motion to dismiss and for sanctions.

"Plaintiff John L. Cheek received wages from American Airlines in the amount of $67,221.61 in 1983 and $75,145.75 in 1984.

"In January 1985 he mailed a claim to defendant James R. Starkey, District Director of the Internal Revenue Service (IRS), for the recovery of income taxes of $22,555.48 and Social Security taxes of $2,532.60 withheld from his wages in 1984.

"In April 1985 plaintiff mailed a claim to defendant Thomas Ludwig, an IRS revenue agent, for the recovery of income taxes of $2,879.66 and Social Security taxes of $2,391.90 withheld from his wages in 1983.

"Plaintiff's claims were never honored. Consequently, he filed this suit against Srakey [sic] and Ludwig in their individual capacies [sic]. Plaintiff argues that the withholding of income and Social Security taxes amounted to an unconstitutional taking of his property and that his wages are not taxable income. He requests the Court to order Starkey and Ludwig to refund the amounts withheld and to assess punitive damages.

"Defendants moved to dismiss the suit and to (p. 677) impose sanctions, costs and attorneys' fees against the plaintiff."

Now at the bottom of page 2:

"Regardless of the sufficiency of service, however, this case is frivolous on the merits. The constitutionality of the income tax laws enacted pursuant to the

Sixteenth Amendment has long been established," citing Brushaber vs. Union Pacific Railroad, 240 US 1, 1915, United States vs. Thomas, No. 85-2120, slip opinion, Seventh Circuit, April the 17th, 1986.

"Moreover, the Seventh Circuit has emphatically stated that wages are taxable income. Granzow vs. Commissioner, 739 Fed 2d 265, at page 267, Seventh Circuit, 1984; United States vs. Koliboski, 732 Fed 2d 1328, at Note 1, Seventh Circuit – 1328, Seventh Circuit, Note 1, 1980 [sic: should be 1984].

"By signing a complaint a plaintiff certifies that to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. Federal Rules of Civil Procedure 11. Rule 11 is designed to discourage dilatory or abusive tactics or lessen frivolous claims (p. 678) by requiring the Court to assess expenses and attorneys' fees against litigants, including pro se litigants, who act in bad faith in instituting or conducting litigation. Federal Rule of Civil Procedure 11, advisory committee note.

"This circuit has repeatedly recognized the propriety of assessing attorneys' fees and costs in cases where parties claim not to owe income taxes or file frivolous tax appeals. Cameron vs. IRS, 773 Fed 2d at 129; Granzow vs. Commissioner, 739 Fed 2d 269; United States vs. Ekeled," E-k-e-l-e-d," 732 Fed 2d 562 and 563, Seventh Circuit, 1984.

There is no good faith basis for the plaintiff's arguments. Sanctions are particularly appropriate here in

light of the fact that plaintiff has unsuccessfully raised essentially identical arguments in a previous action before this Court. See Schaut vs. United States, 585 Fed Supp 137, Northern District of Illinois, 1984.

"Defendants seek sanctions in the amount of their costs and attorneys' fees, which total $1,500, and a $10,000 fine."

Dropping down then to the last paragraph:

"Plaintiff's repeated abuse of the judicial system for the pursuit of frivolous cases entirely (p. 679) justifies the severe sanctions sought by defendants. The motion to dismiss is granted. Plaintiff is ordered to pay the United States $1,500 in costs and attorneys' fees, an amount this Court finds reasonable, and $10,000 as a sanction under Rule 11 for bringing this action in bad faith. It is so ordered.

"Enter: Brian Barnett Duff, United States District Court Judge, dated June 16, 1986."

* * *

(p. 687) MS. SAFFORD: I think, Judge, what we had succeeded in doing was putting in that the case was The United States Court of Appeals for the Seventh Circuit, John L. Creek vs. John Doe, Tom Ludwig and James R. Starkey, decided on June 5 of 1987.

From page 2:

"Cheek sued three employees of the Internal Revenue Service under Section 1983, a district director of the Internal Revenue Service in Chicago, an IRS agent in Schaumburg and an unknown IRS agent 'who intimidated (Cheek's employer) into giving (p. 688) plaintiff's compensation for labor property to the IRS without constitutional authority.'

"He sought reimbursement of Social Security taxes and income taxes withheld from his wages by his employer, American Airlines, in 1983 and '84 of slightly more than $30,000. Cheek's wages as a pilot for American Airlines totaled over $140,000 for 1983 and 1984.

"According to the district court's order, Cheek argued 'that the withholding of income and Social Security taxes amounted to an unconstitutional taking of property and his wages were not taxable income.'

"Cheek's complaint was dismissed for failure to properly serve the defendants pursuant to Rule 4(d)(1) of the Federal Rules of Civil Procedure.

"Cheek served the defendants by leaving a copy of the complaint with employees of the IRS offices, rather than at their homes. The district court noted that Cheek's complaint was frivolous on the merits and that there was no good faith basis for his arguments. The Court further found that the case was an appropriate one for sanctions because Cheek had 'unsuccessfully raised essentially identical claims in a previous action before this Court.' "

From page 3:

(p. 689) "The only non-frivolous argument raised on appeal concerns the imposition of sanctions. First, the

language of Rule 11 itself permits the imposition of an appropriate sanction. While the advisory committee notes indicate that the rule is designed to punish and deter frivolous suits and to discourage dilatory and abusive tactics, we have previously stated that a fine may be an appropriate sanction," omitting the citations.

"Second, the courts have previously held there is no constitutional right to bring frivolous lawsuits," citing Coleman vs. Commissioner of Internal Revenue, 791 Fed 2d 68 at page 72, the Seventh Circuit 1986.

From page 5:

"We regard $5,000, the maximum amount a tax court has the authority to impose as a penalty, as suggesting the maximum sanction appropriate in a case of this kind."

From page 6:

"Thus, notwithstanding that we reduce the sanction imposed below to $5,000, we also impose sanctions of $1,500 for bringing of this frivolous appeal. The decision of the district court is affirmed in part and reversed in part," and it is signed by the (p. 690) Clerk of the United States Court of Appeals for the Seventh Circuit.

* * *

Excerpts from opening statement of John Cheek:

(p. 891) If this were a civil trial it would be an interesting trial because the burden of proof would be a

preponderance of evidence, that is, evidence that would incline an impartial mind to one side rather than the other. If this were a civil tax fraud trial the burden of proof would be clear and convincing evidence, that is, evidence greater than a preponderance of evidence, but need not be beyond a reasonable doubt.

But this is a criminal trial. As Judge Plunkett has already instructed you, I am presumed innocent at the beginning, at the middle and at the end of this trial, up and until, and including, the time that you go back into the jury room and begin deliberations. Innocent until proven guilty beyond a reasonable doubt based on the presumption that I'm innocent to start with.

Although I am presumed to be innocent, and not even required to put on a defense, I did intend to put on an affirmative defense. If you're allowed to hear the truth and the relevant facts as I see them, the evidence will show that I was not told that I was under criminal investigation. Contrary to disobeying the law, I intended only to exercise my First Amendment right to petition the government for a redress of (p. 892) grievances by establishing the correct standing for a constitutional test case.

If you admit that you are a taxpayer, you have lost your standing to make a constitutional test case. If you admit that you are a taxpayer, and the facts will show this if I am allowed to present it, you are subject to the Internal Revenue Code and you must follow all their rules and procedures.

If you admit that you are a taxpayer, or if you sign a tax return under penalty of perjury, your wages are income, and, depending on how many of the facts that we

are allowed to get into – which I can't tell you because I am not an attorney, and, you know, the fact will show that I have been interrupted several times during the trial, and I forgot what I was going to say, and Miss Safford has intimidated me by getting up to object –

* * *

Colloquy at side-bar:

(p. 1010) MR. CHEEK: It gets into the anti-injunction act. The IRS has designed a section that says notwithstanding any part of the code, when you fill out a W-4 exemption, if you turn around and fill it out then you run right tooth and nail into the anti-injunction act and the declaratory injunction act.

THE COURT: We're not going to relitigate the question of whether you have to withhold a withholding tax.

MR. CHEEK: No; what I am saying is all this goes to my state of mind relative to the W-4s that are in front of the jury.

THE COURT: How?

MR. CHEEK: Well, it shows that I was relying on this part of the statute and then as a matter of law, if you are playing within the system, if you are a taxpayer, you have lost because of the other section of the Internal Revenue Code, 7421, I believe it is, the anti-injunction act.

You're given one right in one part of the code and that right is taken away from you in the anti-injunction act.

THE COURT: What does that have to do with whether you took 60 exemptions or allowances or wrote "exempt" on it? What has that to do with this?

MR. CHEEK: It has to do with whether or not you (p. 1011) can have a constitutional tax case.

MR. WHITMORE: But explain it to him, John.

THE COURT: Can Mr. Whitmore explain it to your Honor?

THE COURT: Go ahead.

MR. WHITMORE: What the problem is, and I know that John believes this because, you know, we have been associated a long time, and the problem is that there is a case –

What is the name of the case?

MR. CHEEK: Cheesbrough vs. United States.

MR. WHITMORE: Cheesbrough vs. United States, which states that the income tax is a tax based on self-assessment and voluntary compliance –

MR. CHEEK: No, it doesn't say that. Flora says that.

MR. WHITMORE: Which says any tax is considered voluntary, and once you pay it there is no ground for error alleging that the tax is unlawful. Now, we're not talking about a deduction here; we are talking about whether the tax is lawfully levied. If Mr. Cheek fills out an income tax return, then he is testifying that he has understood the law and that he is liable and he is assessing himself.

Therefore, he has no legal standing whatsoever to challenge the lawful validity of that tax. The only way it can be challenged successfully – now I am talking about (p. 1012) Mr. Cheek's understanding, I am not saying this is the way the law is, but that the only way to challenge that law and to have a correct standing is to not attest yourself to be one who is liable, but to have them withhold your money and then challenge it at common law. That is what Mr. Cheek keeps trying to bring out, but he hasn't given you that message, that he doesn't want to file and break the law, he wants to establish standing where he can bring this before the Supreme Court and not keep having it dismissed because of standing or because of jurisdiction.

He is trying to avoid that jurisdictional problem so he can get a court to hear the issues and not just dismiss it on the jurisdiction.

* * *

(p. 1159) So that's exactly what I did. I went to the seminar. There were approximately 200 well-dressed people in it. There was a gentleman by the name of Pip Bull who told me – or not me, he told the group, that he graduated number one in his Ivy League school, and he went into some of the details about the trust, about all the legal aspects –

* * *

(p. 1162) So what I did is I listened to the lawyers, you know, there was one main lawyer and there were several other people, I don't know if they were attorneys or whether they were just sales representatives, but the thing that really impressed me was the caliber of the people that were there. They were well dressed. The attorney presented himself as graduating cum laude, I believe that's the correct term, or, anyway, was number one from an Ivy League law school, I remember that, so it just really seemed good to me, you know, the idea just seemed good.

The part that really impressed me was written statement, and I'll read it:

> "A Word of Caution. Please don't be deceived by individuals or organizations claiming to be us. There are several individuals and organizations who have attempted to duplicate or imitate, or sometimes outright plagiarize, E.S. Publishers' program. A few standard forms and a smattering of information on trust and tax law is not going to give you a workable family trust.
>
> "Anyone who offers such a program without providing for its legal defense if challenged by the IRS or others is offering a pig in a poke. To our knowledge, no other organization offers this warranty.

> (p. 1163)"If anyone, including any government agency, challenges the tax advantages or legal integrity of a trust properly prepared pursuant to E.S. Publishers' program, E.S. Publishers will defend the trust at no cost to the student. A family trust is one of those things that should either be done right or not done at all. E.S. Publishers provides the information to do it right."

I was very impressed, especially by the written guarantee, because the one thing I didn't want to do was to get in a fight with the IRS. So what I did is, I got the information and I got with a sales representative from E.S. Publishers and I set one up.

* * *

(p. 1168) I went down to Florida and I got the shock of my life. Don O'Donnell, in conjunction with some other people, was sponsoring a two-day seminar, and the speakers were Andy Melanchinsky, Burt McCarthy and Bob Muncaster. Andy Melanchinsky got into the Constitution and he said it was the supreme law of the land, and I knew he was telling the truth because it says so right in Article VI of the Constitution. It says the (p. 1169) Constitution is the supreme law of the land and any law made pursuant to it is the law.

He said that you had to really be careful to stay out of equity jurisdiction. He said there was a difference between constitutional law and equity jurisdiction. He went into detail and explained it, and this and that, and a

lot of it went right over my head. You know, I understand a lot right now what he was saying, but at the time I didn't understand it.

Well, Burt McCarthy, he was a very professional type. He was the type that had on the nice suit and the tie. He seemed to know a lot about the IRS code, and this and that. He said that a suit was won at the kitchen table. What he was saying was that you don't win cases in court like Perry Mason. He said, "You win cases with hard work, years and years of work, years and years of training."

* * *

(p. 1170) I was really impressed that they were talking freedom and liberty and they weren't talking taxes, although it involved taxes. You know, they were saying that income – Bob Muncaster and Burt McCarthy were saying that there was no gain and profit, which had been defined according to them in Supreme Court cases as being income, gain or profit, and they (p. 1171) said that wages are an equal exchange.

They said that wages are a gift from God and that we have a right to enter into a contract. There is no gain or profit when you enter into a contract unless you're a slave to the government, because you are exchanging your God-given labor for money.

They said that income was investment income, like when you go to a bank and you draw interest, or when you have stock and you make a stock capital gain.

You know, what the IRS refers to as passive income, the IRS, you know, based on my understanding of tax

law, you know, when you're a taxpayer and playing within the system, active income according to the IRS is what they refer to as wages, what I'd like to refer to as compensation for labor.

Later on in the testimony, if I remember, I will explain why I made the statement that I didn't make wages. It was from a technical standpoint. It is really somewhat important from a technical standpoint, but I think that there are two kinds of wages involved. I did eventually run across a Supreme Court case which said that wages are a specialized property.

So I drove these guys around. I gave them some money because I thought, "These guys are fighting for my liberty and freedom. I don't have the ability to fight because I can't fight the IRS. I don't want to fight." You know, I (p. 1172) would rather play tennis with Jerry, play tennis with my brother, have a good time. I don't know anything about legal work, and this and that. I thought I don't know anything about legal work, and this and that, but I feel guilty, because I know they are fighting for my liberty.

What they told me really – it really made sense. I could understand for the first time in my life that I realized that they weren't giving me any value on a 1040 tax document for my labor. I understood enough about the calculations to realize that they were not distinguishing between passive income and active income, according to their definitions.

* * *

(p. 1173) So it really made sense. I drove the guys around and I felt like I could buy my freedom, and I went

over to Don's and he showed me a Red Beckman tape, and if there is anything Red Beckman can do, he can keep it simple and he can get to the point. If I may, I would like to diagram exactly what I saw in that video.

* * *

(p. 1179) So, anyway, I watched this Red Beckman film, and, believe me, Red Beckman can do it a little bit better than I can, and he puts a few parts in that have been left out, but I thought, "Boy, does he keep it simple! This really makes sense."

I got ready to come home and Don asked me, he said, "Well, what do you think? It is just as clear as if it happened yesterday. I said, "I think it's fantastic. You guys are doing fabulous. Keep up the good work.

* * *

(p. 1191) I believe it was in October 1980, I joined MACBA. MACBA is a satellite of NCBA, which Mr. Voss testified about.

What they have is three booklets about constitutional taxation, and during this period, starting in October, I am not sure of the exact sequence, I remember specifically going to three different seminars that were taught by George Thiel on the various books. You know, what George Thiel did as a paralegal was he just conducted a constitutional seminar that was sponsored by MACBA, you know, strictly for the purpose of teaching people about constitutional law and taxation, basic minimum

principles about courtroom procedure on civil suits, matters like that, you know, the general knowledge that he had based on manuals.

* * *

(p. 1199) Also during this period I went back to Florida and attended a seminar sponsored by my friend, Captain O'Donnell. It was taught by Dan Pilla. It was a two-day course. It was "Your Right to Fight in the Courts Where it Counts."

This is the information that was contained in the package. This is how to use Shepard's citations, which is a legal procedure when you're reviewing. I do not intend to tender this into evidence. I just wanted to explain it to make reference to my state of mind.

Also during this period, I think it was October 1980, I joined NCBA. These are the three manuals that we get. (Indicating)

* * *

(p. 1200) Well, the only thing is, these manuals were issued, like Mr. Voss said, in 1980, and I think, like he said, they may have come in single units. What I do remember is taking three two-day seminar courses that were taught by George Thiel on the various manuals, we had a seminar on each manual, if I remember correctly, but this was in the fall and winter of 1980, and, as previously mentioned, I believe, I joined both MACBA, which is the local satellite, and NCBA in the late fall or early winter, 1980.

In addition to attending these three two-day educational seminars, I attended several patriot or liberty meetings. Different speakers spoke. One of the things that I obtained during this time was the confidential IRS Audit Guide –

* * *

(p. 1203) The book is "A Management Guide for Trustees." It is "The Family Trust." It is also put out by E.S. Publishers. I do not intend to offer it into evidence, but I wanted the jury to see it just to realize that it was sold, (p. 1204) with the package.

THE COURT: All right.

MR. CHEEK: I think it is really important to understand during this period that I started seeking sources of information. I subscribed – well, I had been subscribing for a couple of years because of Don O'Donnell to a publication called "The Justice Times," and it is just a – am I allowed to show the back of it or the front half of it, or should I –

THE COURT: What is it?

MR. CHEEK: It is just a newspaper, you know, it is a monthly newspaper that deals strictly with the liberty and patriot movement. About 90 percent of it is on taxes. You know, just 10 percent of it is on other –

THE COURT: All right. You're not planning to read from it?

MR. CHEEK: No, I –

THE COURT: You're just telling the jury –

MR. CHEEK: I am not even going to tender it. The only thing I wanted to state is I have been subscribing to this continuously for more than 10 years.

THE COURT: That's fine.

MR. CHEEK: All right. The same thing applies to "The Spotlight." It is a newspaper put out by Liberty Lobby. This is a weekly newspaper. It has a weekly series by Dr. Martin Larson. He has got a Ph.D. He writes an article about (p. 1205) – I would say 75 percent of his articles are on taxes or trusts. Every now and then he gets into something like socialism, or something like that.

This is another newspaper, it is called the "Correspondents." This one is put out by The Golden Mien's Team out of Missoula, Montana. I have subscribed to this one for about three years. It used to be out of Phoenix, Arizona under their Golden Mien's Society. It was Chuck Reilly and Peggy Christianson. They split up and one of them stayed in Phoenix and the other one went to Montana.

These are just representative of a very small sample of the patriot, more or less underground newspaper publications, that most of the public are not aware of. Most of the information starts off with the Justice Times. They place ads in this and you can subscribe.

The main significance is that you can read through this and –

MS. SAFFORD: Your Honor, I object to the form of the testimony now. He is lecturing to the jury on the significance of his exhibit rather than testifying what it was he –

THE COURT: No, that's all right. Go ahead, Mr. Cheek.

MR. CHEEK: The significance as it affected my state of mind is there is a lot of information in here, a tremendous amount of information. The hardest thing you run into when you (p. 1206) first start is you don't know what's the truth and what is not the truth, but there is a tremendous amount of information that you can see and you can go check out if you have got the time.

You know, when you get to the level that I am at right now, it is like the attorney for American Airlines said, you know, that you're not the same when you graduate from law school as you were when you began. I can look at this now, you know, and see the part that is trash, I can look at the stuff I already know, and then, every now and then, I see something that is new that really catches my interest.

You know, I have the ability now to go to a law library and check it out. The important thing of significance to me was the source of information. It also allows people just like myself, people like John Voss - there are people just like me all over the country -

MS. SAFFORD: Objection.

MR. CHEEK: - and it allows a source of communication.

THE COURT: No, he - that can stand.

MR. CHEEK: Which affects your state of mind.

Okay. The bottom line of the whole thing, and the thing that really kept me going, is I believed what these

guys were saying, I believed Bob Muncaster, Amy Melanchinsky; it was so simply that our labor had to have some value, it was so simple that the IRS was not distinguishing between gain and profit from a revenue taxable activity and a contract, in my (p. 1207) opinion, and more than one patriot was saying this.

But, you know, it seemed to be too good to be true and, you know, when you more or less got shock treatment you really wondered, but the thing that really, really impressed me on top of that was the fact that my friend Don O'Donnell said the IRS wouldn't answer my letters. I went through the entire year of 1980 without getting a single question answered.

I remember writing specifically three different letters that asked real easy questions, numbered questions. Well, I take that back. The one I just read today didn't have the questions numbered.

But there was a letter to Mr. Padden that asked two questions that were numbered, the November the 25th letter asked five questions that were numbered, and then the one on the trust asked a couple of simple questions. The IRS didn't answer a single question.

I think I testified earlier that I always filed the trust returns and the other returns around April the 15th, and the reason of course, is because everybody fears an audit. Even if you can justify your deductions, and everything, just getting the paper together and everything is a real harassment.

So I sent them a letter - well, actually, I revoked and rescinded my signature on all past 1040's and W-4s. By

now, based on NCBA lectures and all the other stuff I am catching from the speakers, the fact that they are not (p. 1208) answering my letters, I am pretty well convinced that there is something to this argument that if you have the proper standing in the private sector when you work and exchange your labor there is no gain or profit, which is what these patriots were telling me income is, and that is what some of these cases I am reading in these books say.

* * *

(p. 1227) Being still a little bit uncertain because, you know, it is hard to change ideas that you have had all your life, I was very, very interested in going to licensed counsel and seeing what licensed counsel had to say about the issue, and I remembered an attorney, Robert L. Collins, who had spoken at a seminar sponsored by The Mid-America Commodity and Barter Association, and I went over to him and talked to him, I (p. 1228) mentioned my situation, and the first thing he said was, he said, "Well, I can set up an offshore trust where you won't pay any tax at all."

* * *

He spoke at the seminar in, I believe it was in February, but I don't remember, you know. It has been six or seven years ago. The gist of it was I said, "I relied on legal counsel when I set up my family trust. I am not going to rely on legal counsel to set up an offshore trust. I don't want anything to do with Internal Revenue rules and regulations. The Internal Revenue Code is just too much for me to comprehend. (p. 1229) It's just too thick,"

you know, "The only thing I want is, I want you to research it and see if you can find law or your understanding of the law confirms my understanding of the law that there is a violation of constitutional rights involved in the way that we are taxed," and I said, "Base it strictly on the Constitution. I am definitely not interested in an offshore trust."

* * *

(p. 1230) He came up with an opinion dated August the 27th, 1981, which I would like to tender as Defendant's Exhibit 29, and with the Court's permission, I would like to read to the jury.

* * *

(p. 1236) (letter from attorney Collins):

"A former commissioner of internal revenue stated, 'Our tax system is based on the individual self assessment and voluntary compliance.'

"Furthermore, by filing tax returns the taxpayer is stripped of all constitutional rights under the first 20 amendments of the United States Constitution and also of most rights under his state constitution."

Turning to page 2: (Continuing reading:)

"Finally, you make a valid contention, which has (p. 1237) never been adjudicated by the United States Supreme Court, that Congress' power to tax comes from Article I, Section 8, Clause 1 of the U.S. Constitution, and not from the Sixteenth Amendment and that the letter, construed with Article I, Section 2, Clause 3, never authorized a tax on wages and salaries, but only on gain and profit."

* * *

(p. 1277) What this is, is a book that is filed with Xerox copies of cases. There are probably, out of these volumes I think there are probably around 35 volumes, there are probably around, oh, I would estimate maybe 100 pages of statutes, and the rest of it are cases.

I would estimate that 80 percent of these cases are Supreme Court cases. There are probably maybe 15 percent, maybe 18 percent that are court of appeals and district court cases. Probably two to five percent are state cases, primarily state supreme court cases.

What happened is, I got started in the patriot movement, I went to a lot of meetings and I heard a lot of things, but I didn't know whether the people were telling me the truth or not. I believed them like one of the witnesses that testified for the prosecution did about Mr. Thiel.

* * *

(p. 1281) Well, the Anti-Injunction Act is a statute that is built into the Internal Revenue Code and it says, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Also, if you get into the declaratory judgment act, which is Title 28, Section 2201, "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration."

After I lost a couple of suits, one against American Airlines, where we filed a voluntary non-suit, and one against – I have got a mental block – oh, that was the Schaut suit, where we tried to stop withholding. This was my first indication that a lot of this information we were getting from these patriot movements and our own research wasn't doing the job, so I started digging into the books and I came to the conclusion that you could not stop the withholding of a tax.

* * *

Excerpts from cross-examination of John Cheek:

(p. 1360) A. There is a tremendous organization throughout this country of people just like me, who dearly love our country, we'll risk criminal prosecution, and collusion between the IRS and the Justice Department, where you're not invited to your grand jury indictment, simply because we think the Federal Reserve is the biggest fraud that has ever been palmed off on –

Q. You have a strong disagreement with the Federal Reserve system, right?

A. Absolutely.

Q. And a strong disagreement with the way the law is enforced as to the Internal Revenue laws?

A. My disagreement is based on principle.

Q. On principle?

A. Yep.

Q. It is a very principled and strong disagreement with the law, isn't that right, as it is being administered?

A. I don't think you could say it's that. It is my belief that the law is being enforced unconstitutionally.

Q. Right. You disagree with the way the courts are carrying out the law, is that what you are saying, sir?

A. I don't think I'm saying that at all. I think the Supreme Court has done more to prevent tyranny than the rest of the (p. 1361) people in this county put together.

* * *

Excerpts from the closing argument of John Cheek:

(p. 1623) MR. CHEEK: (Continuing) I am not a tax protestor. I'm not a person who believes in not paying his taxes. I know that each one of you on the jury probably pays taxes on your right to work. I know each and every one of you probably feels it is part of your duty as an American patriot to contribute and pay your fair share of taxes. I agree in principle with proper taxation for legitimate functions of government, but I don't agree with the mess we're in today. A two point eight trillion dollar debt measured in trade units in a private, tax exempt series of 12 corporations, in a two hundred billion dollar annual budget deficit, in a balance of payment trade deficit of about one hundred eighty billion dollars a year, in a Wall Street that is crashing.

I don't agree that our children, if we have got any, being born with a two point eight trillion dollar debt on their heads, that they have got to pay interest on – you and I can't go out and borrow money on unborn children, even ours. Where does the Constitution give the government authority to do that?

(p. 1624) Furthermore, very few people realize it, but there was a statute passed in 1978, Public Law 95-435, that said the budget had to be balanced in 1981. No ifs, ands, buts or maybes. It is on the statute books, Public Law 95-435. They didn't tell you that side of the story.

I didn't spend seven years of my life going to law libraries, not playing tennis with my friends, not romancing girls, to keep from paying taxes they say I owe, when

they know the amount of money I received from American Airlines. That's ridiculous. I have made good money. I have spent a lot of money, a lot of it on patriot activities.

I went in with my brother and we bought our 72-year-old mother a home. That is the one big expense I have spent for.

Look at the books over there. (Indicating) Look at the research. Where is the motive? Why would somebody, making the kind of money I am making, do this to try and deceive anybody? How can you deceive anybody when they tell you the W-2s are on magnetic tape? Who are they kidding? That's not the reason.

The only reason I did what I did is because I believe in this country. There are not too many people like me left. I believe in property taxation. I believe in lawful constitutional money. Those are the facts.

Somewhere along the line something went wrong. (p. 1625) we've been had. They're taxing us too much. It's improper. It's unfair. I don't even have to tell you this. Each and every one of you knows that.

What's the answer to everything today? "We'll raise taxes." Well, that's crazy.

So I'm not a tax protestor. Look at the letters I have written. I have told the IRS exactly what I was going to do. I have done research. I am a concerned American. I believe in our country.

The public debt has tripled in less than the eight years that Reagan has been in office. It was a little less than a trillion dollars. It is now two point eight trillion dollars. Triple the debt in eight years in office.

I want to tell you, not only am I dedicated, I am here fighting for your rights and my rights, too. I'm working for your freedom and my freedom, because it's going down the drain. If I can't get to the Supreme Court and I can't help myself, and I can't help you, then we're all going to lose.

That is why John Cheek is in this court today. I'm not in this court because I don't want to pay my taxes and I want to shaft you and my fellow man. I wouldn't do that. I've never shafted anybody. It's not my style, you know.

* * *

INITIAL JURY INSTRUCTIONS

(p. 1671) THE COURT: Ladies and gentlemen, we have now reached that portion of the trial where I instruct you as to what the law is, and you don't have to memorize all the law that I am going to read to you because the law together with the exhibits will be sent back to you and you will be free to consult the instructions if you wish to do so.

However, I read it to you because the law is that I am required to read it all to you. I just tell you in (p. 1672) the beginning you don't have to memorize it, but listen to it because it covers all the things that relate to the evidence that you have heard.

Members of the jury: The evidence and arguments in this case have been completed and I will now instruct you as to the law applicable to this case. It is your duty to follow all of the instructions.

You must not question any rule of law stated by me in these instructions. Regardless of any opinion you may have as to what the law ought to be, you must base your verdict upon the law given by me.

It is your duty to determine the facts from the evidence in this case. You are to apply the law given to you in these instructions to those facts and in this way decide the case.

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each one of them. In considering the testimony of any witness you may take into account his or her intelligence,

ability and opportunity to observe, age, memory, manner while testifying, any interest, bias or prejudice the witness may have, and the reasonableness of the witness's testimony considered in the light of all the evidence in the case.

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other (p. 1673) witness.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be. You are the sole and exclusive judges of the facts.

Opening statements of counsel for the government and by the defendant are for the purpose of acquainting you in advance with the facts the parties expect the evidence to show. Closing arguments of the government and the defendant are for the purpose of discussing the evidence.

Opening statements, closing arguments and other statements of the parties should be disregarded to the extent they are not supported by the evidence.

During the course of the trial it often becomes the duty of the government or of the defendant to make objections and for me to rule on them in accordance with the law. The fact that either party made objections should not influence you in any way.

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits received in evidence and admitted or judicially noticed facts.

You are to consider only the evidence received in this case. You should not consider this evidence in the light – I'm sorry. Let me start over.

You are to consider only the evidence received (p. 1674) in this case. You should consider this evidence in the light of your own observations and experiences in life. You may draw such reasonable inferences as you believe to be justified from proved facts.

You are to disregard any evidence to which I sustained an objection or which I ordered stricken. Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded. You should not be influenced by sympathy, prejudice or public opinion.

Certain flyers, newspapers and other materials which were originally attached to letters in evidence have been deleted from your consideration on the basis that they are irrelevant to the issues before you. You should not draw any inference from the fact that this evidence or portions of exhibits have been excluded.

The indictment in this case is the formal method of accusing the defendant of a crime and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt.

The defendant is presumed to be innocent of each charge. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and it is not overcome unless from all the evidence in the case you are convinced

beyond a reasonable (p. 1675) doubt that the defendant is guilty.

The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

There are two types of evidence, direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

You have heard some evidence concerning the defendant's filing tax returns in years prior to those charged in the indictment. Those relate to the years of '78 and '79. You may consider this evidence only on the question of intent, knowledge, absence of mistake or accident. This evidence is to be considered by you only for this limited purpose.

You have heard testimony of an expert witness. This testimony is admissible where the subject matter involved (p. 1676) requires knowledge, special study, training or skill not within the ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in the light of all the evidence in this case.

The weight to be given to any particular evidence is not necessarily determined by the number of witnesses testifying on behalf of each side. You are to consider all the evidence in the case in determining the credibility of the witnesses. You may find that the testimony of a smaller number of witnesses for one side is more credible or believable than the testimony of a greater number of witnesses for the other side.

There have been admitted in evidence certain schedules or summaries. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same manner as all other evidence in the case.

The defendant has introduced evidence of his character. More specifically, the defendant has introduced reputation and opinion evidence about character traits of truthfulness and honesty. You should consider character (p. 1677) evidence together with and in the same manner as all of the other evidence in the case.

The defendant is charged in this indictment with the crime of willfully attempting to evade and defeat his income tax for 1980, 1981 and 1983, willful failure to file individual income tax returns for 1980, 1981, 1983, 1984, 1985 and 1986, and with making a false claim for a refund to the Internal Revenue Service for the tax year 1982. The

defendant has denied that he is guilty of all of the charges.

Failure to comply with the requirements of the federal income tax laws for one year is a separate offense from such failure to comply for a different year. Defendant's tax obligations in any one year must be determined separately from his tax obligations in any other year.

The defendant is charged in Counts One, Three and Six with a willful attempt to evade and defeat his individual income tax for the years 1980, 1981 and 1983. The defendant has denied he is guilty of those charges.

Section 7201 of title 26 of the United States Code provides in part that "any person who willfully attempts in any manner to evade or defeat any tax imposed . . . " and now I am leaving out a few words, "shall be guilty" of a criminal violation of the laws of the United States.

To sustain the charge of attempting to evade or defeat the defendant's individual income tax with respect (p. 1678) to a particular year the government must prove the following propositions:

First: That on April 15 of the year following the tax year in question substantial federal income tax was due and owing from the defendant; and

Second: That the defendant knowingly and willfully attempted to evade and defeat such tax by one or more of the acts charged in the particular count of the indictment.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, with respect to a particular

year, then you should find the defendant guilty of the count which relates to that year.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt with respect to a particular year, then you should find the defendant not guilty of the count which relates to that year.

An essential element of the crime of attempting to evade or defeat tax is that, after subtracting the deductions and exemptions allowed by law, the defendant owed the United States substantial tax in excess of that amount withheld by his employer.

The government is not required to prove the exact amount of tax due alleged in the attempted evasion (p. 1679) counts. All that need be proved, or proven, is that the tax due was "substantial" as that term is defined in these instructions.

The word "substantial" as used in these instructions means an amount greater than some small amount, relative to the circumstances of the case. "Substantial" under the statute involved in this case means that the amount of tax due and owing is not explainable because of error, oversight or a reasonable conclusion by the defendant that the amount was inconsequential.

"To attempt to evade or defeat the tax" means to willfully commit any act in any manner, the purpose and intent of which was to evade or defeat the tax due from the defendant.

The acts of attempt to evade or defeat the tax charged in Count One as to 1980 are that the defendant filed various false Employee Withholding Allowance Certificates, Form W-4, and made a claim for a refund of moneys withheld from his wages in 1980.

The acts of attempt to evade or defeat the tax charged in Count Three as to 1981 are that the defendant supplied his employer with Forms W-4 in which he falsely claimed he was exempt from withholding, mailed various letters to American Airlines to prevent their withholding of income taxes, and made a claim for a refund of all federal taxes (p. 1680) withheld from his wages in 1981.

The acts of attempt to evade or defeat the tax charged in Count Six as to 1983 are that the defendant supplied his employer with Forms W-4 in which he falsely claimed to be exempt from withholding, threatened to sue individual employees of American Airlines for complying with Internal Revenue Service requirements, used the Mid-America Commodity and Barter Association as a depository and conduit for his income, issued a letter of demand on American Airlines for taxes withheld, and made claims for refunds of taxes withheld and threatened suits against the Internal Revenue Service.

The government must prove beyond a reasonable doubt at least one of the alleged affirmative acts constituting an attempt to evade or defeat tax due and owing with respect to a particular year. However, the government need not prove each act alleged in the indictment as to that year.

The act or attempt to evade or defeat any tax may, but need not occur before, at the time, or after the tax for

the particular year became due and owing. However, the crime is not complete unless and until there is a tax due and owing.

A taxpayer's return which does not represent an honest and reasonable intent to supply the information regarding income required by the tax code is not a return within the meaning of the Internal Revenue Code or the (p. 1681) regulations adopted by the Commission.

Political or social protest does not constitute a valid legal justification for an individual's failure to file a tax return Form 1040 containing sufficient information as required by law from which the tax can be computed.

An individual who refuses to disclose the amount of his income derived from a legitimate source on the grounds that such disclosure would violate his Fifth Amendment privilege against self-incrimination has improperly invoked and asserted the Fifth Amendment privilege, unless he can show some possibility that such a disclosure may lead to a criminal prosecution.

Revelation of income from legitimate activities, in which no criminal activity was involved, would not constitute self-incriminaton. For instance, legitimate income from business or the profession of being an airline pilot would not come within the Fifth Amendment privilege as asserted by this defendant.

Whether an act constitutes a willful attempt to evade or defeat income tax is a question of fact for you to decide. Affirmative willful attempt may be inferred from any conduct the likely effect of which would be to mislead or conceal. If the tax evasion motive plays any part

in such conduct the offense may be made out, even though the conduct may also serve other purposes.

(p. 1682) The indictment charges in Counts One, Three and Six that one of the means by which the defendant willfully attempted to evade and defeat his individual income tax was by filing false and fraudulent employee withholding exemption certificates, Forms W-4, in which he claimed more withholding exemptions than he was entitled to or claimed to be exempt from withholding. The law requires that "the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled."

The law provides that an employee may not claim exemption from withholding unless he or she had no tax liability in the prior year and expected to have no tax liability in the year in which he files a W-4 claiming to be exempt.

If you find that the defendant did complete and file such forms and that the defendant supplied false or fraudulent information on such form, then you should decide whether in doing so his purpose and intent was to evade or defeat his individual income tax by preventing withholding of income tax by his employer.

Defendant's knowledge of the contents of his tax withholding forms, Forms W-4, may be inferred from the facts and circumstances of the case, including his signatures (p. 1683) on the tax withholding forms involved here.

The law presumes that a person who signs a tax withholding form is aware of the contents of the form. Thus, you may find from the defendant's signature at the bottom of a tax withholding form that he had knowledge of the contents of that form.

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proven by the defendant's conduct, and by all the facts and circumstances surrounding the case.

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.

Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

(p. 1684) An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require

that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.

Disagreement with the law does not constitute a good faith misunderstanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

A person may not prevent the collection of a tax by filing a suit seeking to prevent the collection of that tax.

A person does not waive any constitutional objections to taxes paid by following the procedures of Title 26, United States Code, Section 7422, which requires a person making a claim in the United States District Court for refund of taxes to pay the taxes before bringing suit for refund.

The defendant has testified as to what he states are his interpretations of the United States Constitution, court opinions, common law and other materials he has reviewed. (p. 1685) He has also introduced materials which contain references to quotations from the United States Constitution, court opinions, statutes, and other sources.

He testified he relied on his interpretations and on these materials in concluding that he was not a person required to file income tax returns for the year or years charged, was not required to pay income taxes and that

he could claim exempt status on his W-4 forms, and that he could claim refunds of all moneys withheld.

These materials and the defendant's testimony on questions of law have been admitted solely for the purpose of aiding you in determining whether the defendant's conduct was knowing and willful. You are not to consider this evidence as containing any law that you are to apply in reaching your verdicts, because these interpretations are contrary to the law. All the law applicable to this case is set forth in these instructions.

The defendant is charged in Counts Two, Four, Seven, Eight, Nine and Ten with the crime of willful failure to file individual income tax returns for the years 1980, '81, '83, '84, '85 and '86. The defendant has denied he is guilty of those charges.

Section 7203 of Title 26 of the United States Code provides in part that: "Any person . . . required by this title . . . to make a return . . . who willfully fails to . . . make such (p. 1686) a return . . . at the time or times required by law . . . " shall be guilty of a criminal violation of the laws of the United States.

To sustain the charge in Counts Two, Four, Seven, Eight, Nine and Ten, which cover those years I just mentioned, of the indictment of willful failure to file an individual income tax return, the government must prove the following propositions:

First, the defendant was a person required by law to file a return for the calendar year in question;

Second: For that calendar year the defendant failed to file a return as required by law, and

Third: The defendant acted willfully and knowingly.

If you find from your consideration of all the evidence as to a particular count that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence as to a particular count that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of that count.

Compliance with the income tax laws is mandatory and not voluntary.

For the years 1980, '81, '83 and '84, a single (p. 1687) individual under the age of 65 was required to make and file an individual income tax return if that individual had a gross income of $3,300 or more.

For the years 1985 and 1986 an individual income tax return was required of a single individual under 65 if that individual had a gross income in excess of $3,430 and $3,560, respectively.

"Gross income," as that term is used in these instructions means all income from whatever source derived, including wages and compensation, fees, commissions and similar items and gross income derived from business. Therefore, with respect to the phrase "gross income" used in these charges you are instructed as a matter of law that if you find the defendant received wages or other compensations or fees for services in a particular year then you must find the defendant received gross income in that year.

The government is not required to prove the exact amount of gross income alleged in the willful failure to file counts. All that need be proven is that the defendant's gross income exceeded the statutory amount for the year in question.

If you find beyond a reasonable doubt that the defendant had the requisite gross income for the particular year charged in the indictment, then as a matter of law he was required to file a tax return for that year by April 15 of (p. 1688) the year following.

Similarly, if you find beyond a reasonable doubt that the defendant had a tax liability for the particular year, then, as a matter of law, that tax was due and owing on April 15 of the following year.

A person who is required to file an income tax return must file a Form 1040. The filing of a Form W-2 with the Internal Revenue Service does not constitute the filing of an income tax return as required by law.

When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

The defendant is charged in Count Five with making and presenting a false and fraudulent claim for refund to the Internal Revenue Service for the tax year 1982.

The defendant has denied he is guilty of that charge.

Section 287 of Title 18 of the United States Code provides in part that "whoever makes or presents to any

agency of the United States any claim upon the United States, knowing such claim to be false or fraudulent" shall be guilty of a criminal violation of the laws of the United States.

(p. 1689) The term "agency of the United States" includes the Internal Revenue Service.

To sustain the charge of making a false claim the government must prove the following propositions:

First: That the defendant made or presented a claim to the Internal Revenue Service, an agency of the United States;

Second: That the claim was false or fraudulent;

Third: That the defendant knew the claim was false or fraudulent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Intent may be proved by circumstantial evidence. You may consider any statements made and acts done by the defendant, all of the facts in evidence and the reasonable inferences to be drawn from such facts in determining defendant's intent.

Under Title 26, United States Code, Section 3401(c) the term "employee" includes privately employed

wage (p. 1690) earners performing services in the relationship of an employee to employer. Privately employed wage earners are subject to the income tax laws of the United States.

The provision in Title 26, United States Code, Section 6020, that permits the Secretary of the Treasury to prepare a tax return for an individual who has not filed is irrelevant and does not negate in any way the obligation of individual taxpayers to file their own returns.

With respect to the counts charging failure to file tax returns, there is no requirement that the government prove a tax liability, so long as the proof establishes that the taxpayer had a gross income in an amount which required him to file a return.

It is the defendant John Cheek's theory that he did not willfully fail to file tax returns for the years 1980, '81, '83, '84, '85, '86, nor did he willfully attempt to evade and defeat the income taxes for the years 1980 through 1983.

Mr. Cheek's theory is that he acted at all times in good faith, that is, that he honestly and reasonably believed he was not required to file tax returns. Mr. Cheek contends that he honestly and reasonably believes he is not a taxpayer. He also contends that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so (p. 1691) by filing tax returns.

Mr. Cheek contends that his lawsuits against American Airlines and the Internal Revenue Service, his extensive legal research and his frequent conversations

with several attorneys, including a written opinion from an attorney Robert L. Collins, demonstrate that he has an honest and reasonable belief that he is not required to file tax returns.

Among other things, Mr. Cheek contends that his wages from a private employer, American Airlines, does not constitute income under the Internal Revenue Service laws. Mr. Cheek also contends that his membership in MACBA and MCBA and his filings of W-4s with the Internal Revenue Service claiming 30 or 60 withholding allowances, as well as claiming exempt status, were not designed or intended to evade federal income taxes because he has contended since 1980 that he is not required to file tax returns or to pay federal income taxes.

If you find that Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes or to file tax returns, then you should find Mr. Cheek not guilty of all the charges.

Upon retiring to the jury room select one of your number as your foreperson. Your foreperson will preside over your deliberations and will be your representative here in court.

(p. 1692) Forms of verdict have been provided for you. I'll show them to you. There are three. You should sign only one of them.

The first says:

"We, the jury find the defendant John L. Cheek guilty as charged in the indictment."

This is the form you would sign, the foreperson and all the other jurors, if you concluded that he is guilty of all the charges in the indictment.

The second form says:

"We, the jury, find the defendant John L. Cheek not guilty as charged in the indictment," and again a place for the signatures of the foreperson and all the other jurors.

This is the form you would sign if you conclude that Mr. Cheek is not guilty of any of the charges contained in the indictment.

Finally there is a form that says:

"We, the jury, find the defendant John L. Cheek guilty as charged in Counts ___," and that is left blank, "of the indictment, and not guilty as charged in Counts ___" and that is left blank.

This is the form you would sign if you determine that Mr. Cheek was guilty of some charges in the indictment and not guilty of others. In that situation you would have (p. 1693) to set forth those counts on this line that you find him guilty of and those counts of this line that you find him not guilty of. (Indicating)

You will have a copy of the indictment and you will also have the instructions that outline all those different counts, so you will be able to determine that should this form represent your verdict.

Obviously you sign only one of the three. The other two are left blank.

Take these forms to the jury room with you and when you have reached unanimous agreement on the verdict your foreperson will fill in and date the appropriate form and each of you will sign it.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the Marshal.

The verdict in this case must represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty, must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind.

(p. 1694) Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong, but you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The 12 of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

Thank you for your patience, folks. That concludes the instruction portion of the trial.

* * *

NOTES FROM THE JURY DURING DELIBERATIONS AND CORRESPONDING SUPPLEMENTAL INSTRUCTIONS

A. Jury Note of 4:15 p.m., November 10, 1987, and Court's Supplemental Instruction:

Trial Transcript, pp. 1705-1706;
Note from the Jury:

(The following further proceedings were had herein at 4:33 o'clock, p.m.:)

THE COURT: I have the following communication from the jury, which I got about 15 minutes ago:

"Judge Plunkett:

"We as a jury have been unable to agree on a unanimous verdict.

"We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.

"We have struggled with this point for part of the morning & the entire afternoon with no movement.

"Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?

"Page 53 is the one we cannot get by as to his belief.

"James R. Burgener"

* * *

Trial Transcript, pp. 1723-1724;
Court's Supplemental Instruction:

THE COURT: Miss Safford, I was going to add to the instruction the following language, "You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.

"The government has the burden of proving willfulness beyond a reasonable doubt."

* * *

B. Jury Note of 7:10 p.m., November 10, 1987, and Court's Supplemental Instruction:

Trial Transcript, p. 1726;
Note from the Jury:

(THE FOLLOWING FURTHER PROCEEDINGS were had herein, in chambers, at 7:20 o'clock, p.m. of the same date:)

THE COURT: All right. The jury writes me at 7:10:

> "We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision."

It is signed by Mr. Burgener and the 11 other jurors.

* * *

Trial Transcript, pp. 1757-1759;
Court's Supplemental Instruction:

THE COURT: Folks, I am going to give you a couple of additional instructions and then reread one I gave to you earlier. It is in response to a question the jury sent me two days ago about clarifying for you an honest and reasonable belief, and when I answered that I sent an answer which was not as complete as it should have been, and, accordingly, I am going to answer that question in a more complete manner by these additional instructions.

Ladies and gentlemen of the jury, an objectively reasonable good faith misunderstanding of the law negates willfulness. Whenever the word "reasonable" is used in these instructions it means objectively reasonable.

I instructed you that if you find Mr. Cheek honestly and reasonably believed he was not required to pay income taxes or to file tax returns you should find Mr. Cheek not guilty of all the charges.

To find Mr. Cheek not guilty under that instruction you must find both that Mr. Cheek held the belief honestly and that his belief was objectively reasonable.

An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfullness.

An objectively reasonable good faith misunderstanding of the law, as I told you before, negates willfulness.

An objectively reasonable good faith misreading of the law may be based on the defendant's own legal research or an attorney's advice if such research and advice are objectively reasonable.

Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct if there is a bona fide dispute of law on the issue.

Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense.

Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it.

Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

As I told you before, the government at all times bears the burden of showing willfulness.

* * *

POST-VERDICT NOTES FROM THE JURY

Trial Transcript, pp. 1764-1765:

THE COURT: Now, the jury has written three documents for me which I will now read into this record.

The first note is signed by all the jurors and it says:

"Judge Plunkett:

"We are herein returning our verdict of guilty as charged on all counts.

"Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

"We would request that if possible this statement be read in court."

With that document is a document from Miss Keith that says:

"Judge Plunkett:

"I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law."

Mr. Diener writes:

"A "Honest and Sincere in His Cause" – He is *Guilty*

"B Not "Objectively Reasonable" He Is Guilty."

Mr. Diener, I am a little unsure of what that expresses.

JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way – you know, he's guilty, he's – his honesty and sincerity is sincere.

THE COURT: I see.

JUROR DIENER: The other part –

THE COURT: But not objectively reasonable?

JUROR DIENER: (sic) Is guilty.

THE COURT: Okay.

JUROR DIENER: I was trying to bring that out to clarify –

THE COURT: I see what you're saying. All right.

* * *

Supreme Court, U.S.
F I L E D
APR 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner, a tax protester, convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that many of petitioner's beliefs are deemed "objectively unreasonable as a matter of law." The result is that petitioner – despite the sincere good faith on which he based his defense – can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique approach, under which petitioner was convicted and jailed because a panel announced that his sincerely-held beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

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No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

THE OPINION AND JUDGMENT BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit is reported as *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989). It is included in the Petition for Certiorari as Appendix A.

JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Title 28, United States Code, Section 1254. The judgment of the Court of

Appeals was entered on August 21, 1989. The Petition for Certiorari was filed with this Court on October 19, 1989, within 60 days of the date of the judgment (former Supreme Court Rule 20). This Court granted the Petition on February 20, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed . . . .

26 U.S.C. Sec. 7201 provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof shall be fined not more than $100,000 . . . or imprisoned not more than 5 years or both, together with the costs of prosecution.

26 U.S.C. Sec. 7203 provides in pertinent part:

> Any person . . . required by this Title or by regulations made under authority thereof to make a return, . . . who willfully fails . . . to make such return, . . . at the time or times required by law or regulations shall in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 . . . or imprisoned not more than 1 year or both, together with the costs of prosecution.

18 U.S.C. Sec. 287 provides:

> Whoever makes or presents to any person or officer . . . or to any department or agency thereof, any claim upon the United States or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than 5 years and shall be subject to a fine in the amount provided in this Title.

STATEMENT OF THE CASE

The Proceedings Below

Petitioner John L. Cheek (hereinafter "Cheek") has worked as a pilot for American Airlines since 1973. (*Tr.* 82). From 1969 to 1979 he filed federal income tax returns. (*Tr.* 119). In 1980 he did not file a return. (*Tr.* 126). For the calendar years 1981 and 1982, he filed a form 1040 which was not an acceptable tax return to the IRS (*Tr.* 175, 179), and then for 1983 through 1986 he did not file returns (*Tr.* 129). From January, 1980 to January 1981, he filed with his employer W-4 withholding statements which claimed an increasing number of withholding allowances, eventually

claiming as many as 60 allowances. (*Tr.* 340-344). Thereafter, he claimed on his W-4 form that he was exempt from withholding. (*Tr.* 349). Based on directions from the Internal Revenue Service, American Airlines withheld income taxes from Cheek's wages anyway (*Tr.* 170), and for the years 1984, 1985, and 1986, Cheek would have been entitled to a refund had he filed. (*Tr.* 816-818).

As early as 1978, Cheek had begun attending seminars and following the advice of a group of persons who can most charitably be characterized as mountebanks.[1] These persons, some of whom are lawyers, dispensed as gospel such dubious income tax advice as the notion that wages are not income (but instead are an exchange of one's labor for money) (*Jt. App.* 48-49), that a "family trust" can be set up permitting the assignment of one's income and the deduction of personal expenses (*Jt. App.* 46-47, 52; *Tr.* 263-274), that one can "resign" from the Social Security system, that the payment of income tax is voluntary, and that the income tax is unconstitutional (*Jt. App.* 57). These self-styled tax experts call themselves "patriots"; the Government calls them "tax protesters."[2]

Cheek attended this group's seminars, subscribed to their newsletters, bought their manuals, watched their videotapes, and was personally "counseled" by their

[1] For Cheek's testimony outlining this development of his income tax understanding, see *Jt. App.*, pp. 46-59.

[2] The term "tax protester" apparently loosely refers to persons who the government believes do not pay taxes for reasons of political protest. See *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

leaders. (*Jt. App.* 46, 50-53). He joined one of their organizations, called the Mid-American Commodity and Barter Association, to which he "assigned" his income, and which paid his expenses. (*Jt. App.* 50-51; *Tr.* 536-537). Cheek was even provided with an "opinion letter" from an attorney which approved Cheek's actions. (*Jt. App.* 57). Based on such indoctrination, Cheek embraced some of this group's positions.[3] (*Jt. App.* 80-81).

Needless to say, these "tax protesters" pushed Cheek down the path to disaster. His cult-like devotion to their cause resulted in his lawsuits against American Airlines, against the Internal Revenue Service, and in Tax Court being dismissed as frivolous. (*Jt. App.* 58-59). His "family trust" was audited and disallowed. (*Tr.* 263, 274). And in 1987 Cheek was indicted for tax evasion for 1980, 1981, and 1983 (26 U.S.C. Sec. 7201); for filing a false claim for refund of his 1982 withholdings (18 U.S.C. Sec. 287); and for willful failure to file income tax returns for 1980, 1981, 1983, 1984, 1985, and 1986 (26 U.S.C. Sec. 7203). (*Jt. App.* 5-15).

Each of these statutes defines a specific intent crime. The only fact question at trial was whether Cheek's conduct was willful, that is " . . . a voluntary, intentional violation of a known legal duty."[4] Cheek's defense was that, based on the almost cult-like indoctrination he got

[3] A long-time acquaintance testified that Cheek was "obsessed." (*Tr.* 1115)

[4] *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976).

from the "tax protesters," he sincerely believed at the time in the lawfulness of what he was doing. As Cheek testified, "I can look at this now, you know, and see the part that is trash . . . I believed it." (*Jt. App.* 54).

Cheek, appearing *pro se*, was found guilty by a jury on all counts, and was sentenced to a year and a day in jail. Both the trial court and the jury had great difficulty applying the instructions mandated in such cases by the Seventh Circuit (see discussion below). The trial court permitted Cheek to remain free on bail pending appeal, stating, "I do not regard any appeal here as frivolous." (*Tr.* 1798). The Court of Appeals for the Seventh Circuit affirmed Cheek's conviction, but granted Cheek's motion to stay the mandate pending this Court's ruling on his petition for a writ of *certiorari*. (*Appendix F* to Certiorari Petition). On February 20, 1990, this Court granted Cheek's petition.

The Jury Instructions

Throughout the trial, the District Court struggled with both the evidentiary and the jury-instruction implications of the Seventh Circuit's unique interpretation of *Pomponio's* willfulness definition as it is applied to tax cases in that Circuit involving so-called "tax protesters."[5]

[5] This unique "objectively reasonable" doctrine is embodied by *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), and by the instant case, *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989).

In its initial set of instructions[6] to the jury, the Court gave the *Pomponio* definition:

> When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

(*Jt. App.* 78). The Court initially also gave Instruction No. 32, which embodies one prong of the Seventh Circuit's *Buckner* rule:

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendants' own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith understanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

(*Jt. App.* 74-75) (Emphasis added). The Court drafted for Cheek and also read to the jury as part of the initial

[6] The entire set of initial jury instructions is included in the Joint Appendix at 64-84.

instructions this "theory of defense" instruction, which recited Cheek's understanding of his tax obligations, but again imposed the objectively reasonable standard:

> It is the defendant John Cheek's theory that he did not willfully fail to file tax returns for the years 1980, '81, '83, '84, '85, '86, nor did he willfully attempt to evade and defeat the income taxes for the years 1980 through 1983.
>
> Mr. Cheek's theory is that he acted at all time in good faith, that is, that he honestly and reasonably believed he was not required to file tax returns. Mr. Cheek contends that he honestly and reasonably believes he is not a taxpayer. He also contends that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns.
>
> Mr. Cheek contends that his lawsuits against American Airlines and the Internal Revenue Service, his extensive legal research and his frequent conversations with several attorneys, including a written opinion from an attorney Robert L. Collins, demonstrate that he has an honest and reasonable belief that he is not required to file tax returns.
>
> Among other things, Mr. Cheek contends that his wages from a private employer, American Airlines, does not constitute income under the Internal Revenue Service laws. Mr. Cheek also contends that his membership in MACBA and MCBA and his filings of W-4s with the Internal Revenue Service claiming 30 or 60 withholding allowances, as well as claiming exempt status, were not designed or intended to evade federal income taxes because he has contended since 1980 that he is not required to file tax returns or to pay federal income taxes.

> If you find that Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes or to file tax returns, then you should find Mr. Cheek not guilty of all the charges.

(*Jt. App.* 80-81) (Emphasis added).

The latter two jury instructions told the jury, as the Seventh Circuit requires, that willfulness is negated only if Cheek's beliefs or understanding of the law were not only sincerely held, but also "objectively reasonable."[7]

The jury was troubled. At 4:30 p.m. on the first full day of deliberations, they sent this note to the Court:

> We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 is the one we cannot get by as to his belief.

(*Jt. App.* 85).

---

[7] These instructions also expressly stated that Cheek's belief that his wages were not income could negate willfulness if sincerely and honestly held and objectively reasonable. It was after closing arguments and after several juror notes that the court then told the jury the exact opposite. See discussion *infra*, p. 35.

In response to this note, and over Cheek's objection, the Court gave a supplemental jury instruction, as follows:

> You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection system and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.
>
> The government has the burden of proving willfulness beyond a reasonable doubt.

(*Jt. App.* 86).

Even after getting this supplemental instruction, the jury was deadlocked. At 7:10 p.m., the jury sent out this note:

> We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision.

(*Jt. App.* 87).

At the Government's suggestion, and again over Cheek's objection, the Court gave the jury a second supplemental instruction (Jt. App. 87-89), which stated, *inter alia*:

> An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfulness.
>
> * * *
>
> Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense.

Here the jury was told, as required by *Buckner, supra*, that Cheek's belief that wages were not income could never support a willfulness defense, no matter how honestly and sincerely he believed it. This part of the second supplemental instruction directly contradicted the original theory of defense instruction.

Approximately 2-1/2 hours after getting this second supplemental instruction, the jury returned with guilty verdicts on all counts. The jury also sent three notes to the Court. (*Jt. App.* 90-91). The first note was signed by all the jurors:

> Judge Plunkett:
>
> We are herein returning our verdict of guilty as charged on all counts.
>
> Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These

opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

The second note, from an individual juror, stated:

Judge Plunkett:

I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law.

The third note, written by juror Diener, prompted a brief colloquy with the court:

THE COURT: Mr. Diener writes:

"A 'Honest and Sincere in His Cause' – He is *Guilty*

"B Not 'Objectively Reasonably' He Is Guilty."

Mr. Diener, I am a little unsure of what this expresses.

JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way – you know, he's guilty, he's – his honest and sincerity is sincere.

THE COURT: I see.

JUROR DIENER: The other part –

THE COURT: But not objectively reasonable?

JUROR DIENER: (sic) Is guilty.

THE COURT: Okay.

JUROR DIENER: I was trying to bring that out to clarify –

THE COURT: I see what you're saying. All right.

At sentencing, Cheek was given a year and a day in prison, although the District Court stated, "I do not want to sentence you for beliefs that I believe were honestly held, although I believe foolishly held." (March 16, 1988 Tr. 4).

SUMMARY OF THE ARGUMENT

This Court has consistently construed the willfulness element of the criminal tax statutes to require proof of "a voluntary, intentional violation of a known legal duty," *United States v. Pomponio*, 429 U.S. 10, 12 (1976), *rehearing denied*, 429 U.S. 987 (1976). This species of the mistake-of-law defense has particular vitality in the tax context, because "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *United States v. Murdock*, 290 U.S. 389, 396 (1933).

In *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), however, the Seventh Circuit formulated a quite different doctrine which it has applied only to one particular type of criminal tax defendant – the so-called "tax protester." This *Buckner* rule has two prongs. First, in order to negate willfulness, *Buckner* requires a defendant to convince the jury not only that his misunderstanding

or belief as to the tax laws was sincerely held ("bona fide"), but also that it is "objectively reasonable." Second, *Buckner* finds that certain listed misunderstandings or beliefs are objectively unreasonable as a matter of law and thus may never be advanced as a defense, no matter what the particular circumstances which gave rise to the belief. Ominously, the Seventh Circuit advised in *Buckner* and *Cheek* that this list of "forbidden" beliefs "no doubt . . . will increase with time." *United States v. Cheek*, 882 F.2d 1263, 1269 (7th Cir. 1989). More ominously still, these pronouncements are applied retroactively, as in Cheek's case, to alleged tax offenses which predated the Seventh Circuit's promulgation of the "forbidden beliefs" list.

The Seventh Circuit's *Buckner-Cheek* rule is totally inconsistent with this Court's construction of the willfulness element of the criminal tax laws as defined in *Murdock* and *Pomponio, supra*. Seven other Circuits have squarely rejected the *Buckner-Cheek* approach as a matter of statutory construction.

Moreover, if *Buckner-Cheek* were found to be consistent with the criminal tax laws, then that novel rule would cause those statutes to violate the First Amendment's freedom of speech clause, the Fifth Amendment's due process clause, and the Sixth Amendment's jury trial clause. When intent is an element of an offense charged, its existence is a question of fact that cannot be taken from the jury by instructions from the Court. *Morissette v. United States*, 342 U.S. 246 (1952). A conclusive presumption which impinges on this jury function violates the Fifth and Sixth Amendments. *Sandstrom v. Montana*, 442 U.S. 510 (1979). And a rule of law which penalizes some beliefs solely because of the perceived obnoxiousness of

their content violates the First Amendment. *Boos v. Barry*, 485 U.S. 312 (1988).

The Seventh Circuit's unique *Buckner-Cheek* rule fails under all of the above standards. Under *Buckner-Cheek*, a jury can convict a defendant of a specific-intent felony even if the defendant lacked criminal intent, if the jury finds that the defendant's belief is "objectively unreasonable." Under *Buckner-Cheek*, certain listed beliefs are *"persona non grata"* as defenses. The jury is told of the conclusive presumption that such beliefs are, as a matter of law, objectively unreasonable. The jury is not permitted to determine the *Murdock* "bona fides" of the defendant's claimed misunderstanding of law, if his beliefs fall within the Seventh Circuit's "forbidden" list.

Buckner-Cheek cannot be permitted to stand.

ARGUMENT

I

THE SEVENTH CIRCUIT'S BUCKNER-CHEEK RULE CANNOT BE RECONCILED WITH THIS COURT'S LONGSTANDING CONSTRUCTION OF THE RELEVANT STATUTES

A. This Court's Decisions

The income tax collection system in this country is enforced through a wide range of both civil and criminal penalties. Criminal prosecution is but the "capstone" of this system of sanctions which exists to "provide a penalty suitable to every degree of delinquency." *Sansone v. United States*, 380 U.S. 343, 350 (1965). Thus, this Court

has consistently held that criminal tax offenses are specific intent crimes, and that a defendant does not become a criminal by his mere failure to measure up to some prescribed standard of conduct. And because of the complexity of the income tax laws, the mistake of law defense has long been recognized as having particular vitality.

In *United States v. Murdock*, 290 U.S. 389 (1933), the defendant was charged with a willful failure to provide information to the IRS when he asserted his Fifth Amendment privilege against self-incrimination in response to questions put to him by a revenue agent. The trial court took two actions which this Court condemned, which are remarkably similar to what happened in the case at bar. First, the trial court instructed the jury that the court believed that the Government had carried its burden and that the defendant was guilty. Second, the trial court refused a defense instruction which would have told the jury that the defendant's actual good faith belief in the propriety of his Fifth Amendment assertion could constitute a defense.

Murdock, 290 U.S. at 396 held:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

The Court held that the defendant had a right to have the question of the absence or presence of evil motive (willfulness) submitted to the jury. The Court added that the defendant was also entitled to the good faith and actual

belief instruction he had requested, even though his refusal to answer the questions put to him by the revenue agent was intentional and without legal justification. *Id.* 396-397. *Murdock* held that in tax cases "bad faith or evil intent" is a specifically required element of the crime. *Id.* at 398.

In reaching these conclusions, *Murdock* first summarized various "willfully" definitions from other cases and contexts. The Court noted that "willfully" sometimes includes an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, obstinately, perversely, a thing done without ground for believing it is lawful, and conduct marked by careless disregard whether or not one has the right so to act.[8] After reviewing these various definitions, the Court concluded that in criminal tax cases an evil motive or intent is an element of the offense.

In *Sansone v. United States*, 380 U.S. 343 (1965), the defendant had realized a capital gain on the sale of a part of his land. His defense was that he believed that repairs needed to be done on the remaining land which he held which would eliminate the gain, and therefore he had no income. *Sansone* held that the defendant's conduct was willful "if he knew he should have reported more income than he did." *Id.* at 353. Just as in *Murdock*, there is no

[8] In its response to the *certiorari* petition, the Government incorrectly states that these sample willfulness definitions in *Murdock* were held to apply to the criminal tax statutes. *Murdock* did just the opposite.

suggestion in *Sansone* that there is some objective standard of conduct to which a criminal tax defendant must conform.

In *United States v. Bishop*, 412 U.S. 346 (1973), this Court considered a Ninth Circuit decision that a lesser kind of willfulness would suffice for conviction of a tax misdemeanor. The Ninth Circuit had held that Bishop could be convicted upon a showing of "unreasonable, capricious or careless disregard for the truth" in the tax treatment of his walnut ranch operations. This Court disagreed. As in *Murdock* and *Sansone*, in *Bishop* this Court once again rejected any notion that willfulness could be shown by an unreasonable, capricious, or careless disregard for the truth. The Court held that willfulness has the same meaning throughout all of the criminal tax statutes. The Court noted that: "In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law." *Id.* at 360. The Court rejected the Ninth Circuit's formulation of a lesser willfulness threshold, stating: "Degrees of negligence give rise in the tax system to civil penalties." *Id.* at 361. The Court reaffirmed what it said in *Murdock* and *Sansone*:

> The Court, in fact, has recognized that the word willfully in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as bad faith or evil intent . . . . or evil motive and want of justification in view of all the financial circumstances of the taxpayer.

Id. at 360.

Three years later, this Court so held yet again. In *United States v. Pomponio*, 429 U.S. 10 (1976), defendants accused of tax evasion invoked as a defense their belief that payments to them were loans and not dividends, and their belief that certain losses were those of a partnership, rather than their corporation. In a per curiam opinion, this Court again noted that willfulness in the tax context requires more than a careless disregard for the truth. *Id.* at 12. The Court concluded that "evil motive" means the specific intent to violate the law. As to jury instructions, the Court stated that willfulness means "a voluntary, intentional violation of a known legal duty." *Id.* at 12. *Pomponio* expressly noted that "an additional instruction on good faith was unnecessary." *Id.* at 13.

B. The Other Circuits

Thus for more than 40 years, from *Murdock* in 1933 through *Pomponio* in 1976, this Court has consistently held that criminal tax prosecutions require proof of specific intent to violate the law, and that such statutes do not reach conduct which is negligent or unreasonable, or which is the result of a bona fide misunderstanding of the duty to file returns or pay taxes. Under this rule, our tax collection system proceeded without any serious reported difficulty. All of the other Circuits which have considered the question have applied *Pomponio* and its antecedents to tax cases involving evasion and failure to file without apparent difficulty, even as to tax protesters. In *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985), Judge Coffin collected both this Court's and the Circuit law to reject as plain error the District Court's "objectively reasonable"

instruction in tax protester cases, and reversed the defendant's conviction. Judge Coffin noted that in the context of criminal tax laws: "The mistake of law defense has particular vitality, and the key is whether the defendant honestly held a mistaken belief as to what the law requires." *Id.* at 193. Other Circuits concur. *United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983); but see *United States v. Schiff*, 801 F.2d 108, 112 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987) (dictum; an objectively reasonable instruction "would not have been error"); *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir. 1984), *cert. denied*, 469 U.S. 858 (1984); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956) ("ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negate willfulness in failure to perform the duty"); *Mann v. United States*, 319 F.2d 404, 409-410 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964) (plain error to instruct the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequences of his conduct"); *United States v. Burton*, 737 F.2d 439, 441 (5th Cir. 1984) (a taxpayer's claimed belief that wages are not income need not be objectively reasonable to constitute a defense); *United States v. Flitcraft*, 803 F.2d 184 (5th Cir. 1986), *after remand*, 863 F.2d 342 (5th Cir. 1988) (plain error to give an "objectively reasonable" instruction in a tax protester case); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); *United States v. Jerde*, 841 F.2d 818, 822 (8th Cir. 1988) ("We agree that a subjective rather than an objective standard is to be applied in evaluating a good faith defense [to tax charges]"); *Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974), *cert. denied*, 419

U.S. 1123 (1975) ("If a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a tax return"); *Haigler v. United States*, 172 F.2d 986, 989 (10th Cir. 1949) ("We think it irreconcilably inconsistent to say in one breath that guilty knowledge of the consequences of the act done is the essence of the offense and in the next breath say that ignorance of the consequences of those acts is no excuse"); *United States v. Phillips*, 775 F.2d 262, 263 (10th Cir. 1985) ("We find that a subjective standard is appropriately applied in assessing a defendant's claimed belief that the law did not require that he file a return"); *United States v. Payne*, 800 F.2d 227, 229 (10th Cir. 1986) (the jury was told " . . . even if a defendant's claim of good faith misunderstanding is 'unreasonable,' the jury may nonetheless still find that the defendant acted in good faith and did not willfully intend to violate the tax law"); *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984) (it is the province of the jury, not the court, to decide defendants' good faith).

In all ten of the above Federal Circuits, a defendant accused of tax evasion or willful failure to file has – just as, under *Pomponio*, he should – a "good faith" defense. In those Circuits, the defendant does not have the added burden of convincing the jury that his beliefs, although sincerely held, are "objectively reasonable" (whatever that may mean). And in those Circuits, the defendant does not face the obstacle that some of his beliefs may have been determined to be "unreasonable" as a matter of law.

C. The Seventh Circuit's Buckner-Cheek Rule

Then in the 1980's the Seventh Circuit formulated what is now known as the *Buckner-Cheek* doctrine. This doctrine was born of frustration and impatience with the so-called tax protesters. It finds no support under the rulings of this Court, in other Circuits, or under the Constitution of the United States.

The Seventh Circuit has not been reluctant to express its disgust and impatience with tax protesters. The Court expressed its weariness of the tax protesters' "tired arguments" in *Coleman v. Commissioner*, 791 F.2d 68, 68-70 (7th Cir. 1986), and then anathematized tax protesters as "thorns in the side of the federal judiciary" a year later. *McLaughlin v. Commissioner*, 832 F.2d 986 (7th Cir. 1987). *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), represented the culmination of the Seventh Circuit's impatience.

Prior to the 1980's, however, there was no suggestion that the Seventh Circuit treated tax protesters any differently than they were treated in the other Circuits. Consistent with this Court's construction of the criminal tax statutes, the Seventh Circuit applied a "subjectively reasonable" standard for good faith defenses.[9] *United States v. Phillips*, 217 F.2d 435 (7th Cir. 1954)[10]; *United States v.*

[9] "Subjectively reasonable" means reasonable to the defendant; "objectively reasonable" means reasonable to someone else.

[10] In *Phillips*, the Seventh Circuit added at 442: "It is not the province of this court, and neither was it that of the trial court, to appraise the reasonableness or unreasonableness of the evidence relative to the advice of counsel theory."

Matosky, 421 F.2d 410, 413 (7th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970). It was not until *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), that the Seventh Circuit first suggested that the mistake of law defense in tax cases must meet a negligence threshold, that is, must be "objectively reasonable." As other Circuits have since recognized, this statement in *Moore* was pure *dictum*. See *United States v. Burton*, 737 F.2d 439, 443 (5th Cir. 1984).

Notwithstanding this *dictum* in *Moore*, no "objectively reasonable" instruction was given in the next several tax protester cases before the Seventh Circuit. *United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982); *United States v. Koliboski*, 732 F.2d 1328 (7th Cir. 1984). In fact, *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984), repudiated the *dictum* in *Moore* and held, consistent with the other Circuits, that in a failure-to-file tax case a defendant's beliefs, even if unreasonable, can constitute a defense! Said the Seventh Circuit: "We agree that Dack was entitled to an acquittal if he could demonstrate a bona fide belief in the necessity of a tax assessment, even if that belief was objectively unreasonable."

Despite *Dack*, in four cases during 1985 and 1986, District Courts in the Seventh Circuit gave an "objectively reasonable" instruction as the law of the Seventh Circuit.[11] *United States v. Thibodeaux*. 758 F.2d 199 (7th Cir. 1985); *United States v. Witvoet*, 767 F.2d 338, 340 (7th Cir. 1985); *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1986), *cert. denied*, 474 U.S. 1082 (1986); and *United States*

[11] At least one District Judge in the Seventh Circuit continued to advocate the subjective standard. See *United States v. Wojtas*, 611 F.Supp. 118 (N.D. Ill. 1985).

v. Thomas, 788 F.2d 1250, 1253 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986). In all four cases, the Government's proffered "objectively reasonable" instruction was given, and the Seventh Circuit held that proper objection had not been made and that the instruction was not plain error. In the next three reported tax protester cases, the "objectively reasonable" instruction was apparently given, but was not squarely dealt with on appeal. *United States v. Foster*, 789 F.2d 457, 461 (7th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *United States v. Ferguson*, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1986); and *United States v. Sato*, 814 F.2d 449, 451 (7th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987).

It was not until 1987 in response to the "tired arguments" offered by tax protester "thorns in the side of the federal judiciary" that the Seventh Circuit expressly embraced the "objectively reasonably" standard. *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987); *United States v. Davenport*, 824 F.2d 1511, 1517 (7th Cir. 1987). Notably, the Seventh Circuit applied its new "objectively reasonable" standard, contrary to the rule in the other Circuits, contrary to this Court's decisions, and contrary to the Seventh Circuit's own earlier rulings, only to tax protesters, and not to more traditional criminal tax defendants. The crowning blow came in *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), in which the Seventh Circuit, in a two-page opinion, approved the Government's "preemptive strike," in which a number of potential willfulness defenses were precluded before trial as objectively unreasonable as a matter of law.

In *Buckner*, the District Court granted the prosecutor's request for an order forbidding the defense to bring

to the attention of the jury by argument or evidence any matters relating to five enumerated issues. These issues, which the Court characterized as the "repertory of the tax protest movement," are the following:

1. That the Sixteenth Amendment to the Constitution was improperly ratified and therefore never came into being;
2. That wages are not income, and therefore are not subject to federal income tax laws;
3. That tax laws are unconstitutional;
4. That filing a tax return violates the privilege against self-incrimination under the Fifth Amendment to the Constitution; and
5. That Federal Reserve Notes do not constitute cash or income.

The Seventh Circuit held that the possession of and advocacy of these beliefs in a tax protester prosecution "amounts to obdurate refusal to acknowledge the law." Terming the defendant's reliance on *Pomponio, supra*, a mere "technical argument," and ignoring its own 1984 holding in *Dack*, the Seventh Circuit decided that to accept "every mistake of law as a defense" would lead "people to be ignorant, to delude themselves, or to tell tall tales to the jury," and that "[t]o accept only a reasonable mistake as a defense would lead people to learn and comply with the law." *Buckner, supra*, 830 F.2d at 103. The Seventh Circuit clearly has little faith in the ability of juries to distinguish, in tax protester prosecutions, the charlatans from the sincerely misled.

Thus, *Buckner* does two things. First, in the Seventh Circuit a misunderstanding of the law – no matter how honest and sincere it may be – is a defense only if it is

also "objectively reasonable." Second, in the Seventh Circuit certain beliefs are "objectively unreasonable" as a matter of law, thus precluding them from ever being advanced by a given tax defendant, no matter what his particular circumstance or gullibility. And the list of prohibited beliefs is growing. In the instant case, for example, the Seventh Circuit put seven forbidden beliefs on the list as "stock arguments of the tax protester movement." *Buckner, supra*, 830 F.2d at 103. (*Buckner* had been content with only five forbidden beliefs.[12])

Cheek also added the following ominous note: "We have no doubt that this list will increase with time." *Cheek, supra*, 882 F.2d at 1269. Thus, a person in the Seventh Circuit who has some question or confusion about his income tax obligations operates at his peril; the court may one day retroactively decide that his particular misunderstanding was, in the opinion of the judges, "objectively unreasonable" and thus forbidden. Indeed, *Buckner* was applied to Cheek's prosecution even though the offenses that Cheek was charged with occurred prior to *Buckner*, and arguably at a time when *Dack* was the law in the Seventh Circuit.

Surely this Court cannot countenance such lawlessness. Tax protesters may well be "thorns" in our side. But

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[12] *Cheek* added to the *Buckner* list the belief that the Sixteenth Amendment is unconstitutional generally and the belief that the income tax violates the "takings" clause of the Fifth Amendment. *Cheek* also acknowledged that the Seventh Circuit rule is contrary to every one of the seven other Circuits which have considered the question: the First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits.

we as a society have a commitment to trust in the collective wisdom, perception, and ability of a jury to distinguish the guilty from the innocent. We are not (or were not, before *Buckner* and *Cheek*) in the business of convicting and jailing honest and sincere persons whose legal sophistication fails to reach some judicially-created standard.

Thus, *Buckner* and *Cheek* established law, unique to the Seventh Circuit, which:

1. is applied only to tax protesters;
2. permits conviction, even if a belief is sincerely held;
3. precludes certain beliefs from being advanced regardless of the circumstance;
4. is applied retroactively; and
5. may in the future condemn other beliefs not now known to be condemned.

II

THE SEVENTH CIRCUIT'S UNIQUE BUCKNER-CHEEK RULE IS AS UNNECESSARY AS IT IS UNFAIR

Buckner-Cheek does to the criminal tax laws precisely what this Court's decisions, and this Court's construction of the criminal tax statutes, forbid. *Buckner-Cheek* espouses the very judicially-created "prescribed standard of conduct" condemned by this Court in *Murdock*. It lowers the standard for willfulness to that which was condemned by this Court in *Bishop*: a "showing of unreasonable, capricious or careless disregard for the truth." Under *Buckner-Cheek*, a criminal tax defendant may not

harbor beliefs which federal Circuit Judges deem unreasonable. And a tax defendant who dares to harbor beliefs on the Seventh Circuit's proscribed list is conclusively presumed to have exhibited an "unreasonable, capricious, or careless disregard for the truth." *Buckner-Cheek* turns specific intent crimes into negligence crimes.

Under the pretext of encouraging people "to learn and comply with the law," *Buckner-Cheek* does all this solely out of impatience with the "tax protester movement." But for a court to deal so harshly and summarily with the "tax protester movement" is dangerous indeed; as in this case, the innocently gullible are caught in the same *Buckner* net as the cynically willful violators. And *Buckner-Cheek* shows no respect for the considerable ability of a jury to make the essential "willfulness" judgment. This Court must be especially vigilant to ensure that people who espouse annoying and controversial beliefs, as defenses to a criminal charge, are treated no differently than those whose beliefs are more traditional. In the Seventh Circuit, a defendant indoctrinated to believe that wages are not income may not offer such a subjective state of mind as a defense; on the other hand, a defendant who wrongly believes that a particular payment to him is a loan rather than income may tender that as a defense. What is the difference between those two equally wrong beliefs? Only that one has passed a judicial "litmus test" and the other has not. One belief, though wrong, is "respectable"; the other smacks of the annoying tax protester. Such an approach is both dangerous and fatally inconsistent with this Court's construction of the criminal tax statutes.

Under *Pomponio* and its progeny, the following principles apply to criminal tax prosecutions:

> (1) A defendant who knows what the law is and who disagrees with it (or disobeys it to make a political statement) does not have a bona fide misunderstanding defense[13]; but
>
> (2) A defendant who fails to file a return or to pay taxes because of a bona fide misunderstanding of his duties to file and pay taxes has not acted willfully.

Whether such a claimed misunderstanding is bona fide or pretextual is a classic example of the sort of fact question, unique to each case, which is for juries to decide. Common sense and experience tell us that whether a claimed misunderstanding is bona fide or pretextual in a particular case is dependent on at least three factors: (i) the content of the claimed misunderstanding; (ii) the source, origin, or basis of the misunderstanding; and (iii) the background or sophistication of the defendant in tax matters. *Buckner-Cheek*, however, eliminates this individualized, fact-based jury determination, and replaces it with a judge-made conclusive determination related solely to the content of the claimed misunderstanding. That is both unfair and unnecessary. In assessing "willfulness" in a tax protester prosecution, a jury is certainly free to consider as one factor the reasonableness of a defendant's

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[13] In its response to our *certiorari* petition, the Government dances on the head of a pin by claiming that a defendant "knows his legal duty" even though he does not "subjectively believe it." We leave such a discussion to the philosophers. Under *Murdock* and *Pomponio*, a defendant who has a bona fide misunderstanding of his duty to file does not "know" his legal duty, and lacks willfulness.

claimed misunderstanding. But what is relevant is not only the reasonableness of the content of the defendant's claimed misunderstanding, but more importantly, the reasonableness of its genesis – that is, how the defendant came to think that (*e.g.*) wages were not income. Cheek, for example, was told this at hotel seminars, by lawyers, and by speakers whom even the Government's witness said were "very convincing." Cheek was furnished tracts, tape cassettes, form letters, and complaints by these persons. Can it fairly be said that Cheek's reliance on these sources, or their persuasiveness, is always, as a matter of law, irrelevant to his willfulness?

Buckner-Cheek, however, says that the genesis of a defendant's forbidden belief is irrelevant, because the content of the belief is forbidden (is "objectively unreasonable as a matter of law"), and the jury may hear no more. Thus, by focusing solely on the content of a belief, *Buckner-Cheek* deprives any particular defendant of his day in court to explain to the jury how he came to believe such an objectively unreasonable thing. Similarly, *Buckner-Cheek* prohibits the jury from considering the tax sophistication or tax gullibility of the particular defendant before them. Indeed, Cheek's jury was expressly told that the "advice or research" that resulted in the forbidden conclusion "is not objectively reasonable." (*Jt. App.* 88). Thus, *Buckner* imposed a negligence standard not only on the content of Cheek's own understanding, but also on the advice and research others gave him – and then, in effect, directed a verdict on both points.

An examination of the record in this case demonstrates the unfairness of *Buckner-Cheek*. The Government

argued that Cheek knew very well what his tax obligations were, but that he disagreed with the tax laws. Out of a sense of political protest, according to the Government's theory, Cheek embarked on the suicidal path of refusing to file his returns (even when he was due a refund), bombarding the IRS with letters, and even suing his longtime employer, American Airlines, to stop all withholding of taxes. Despite all the warnings to Cheek about his duty to file, the Government argued, Cheek "obdurately refused" to acknowledge the law. (*Tr.* 1662-1667). (The Government also argued, of course, that in any event Cheek's views were not objectively reasonable. (*Tr.* 1620).)

To be sure, Cheek's asserted beliefs may appear bizarre to this Court. "But juries are not bound by what seems inescapable logic to judges." *Morissette, supra*, 342 U.S. at 276. Cheek's defense – that, in fact, he honestly believed them at the time – was hardly frivolous. His testimony outlines the development of his views as he was swept ever further into the tax protest movement through well-appointed seminars, "very convincing" speakers, tracts, tapes, and attorney opinion letters. (*Jt. App.* 46, 50-53, 57). Under *Buckner-Cheek* none of this was relevant (as the jury was ultimately told). But even the law books are rife with tales of well-meaning, naive people who buy desert real estate, invest in companies that claim to be able to turn water into gasoline, and otherwise fall for a line which is "too good to be true." In the case at bar, when these self-styled "tax patriots" rented their hotel conference rooms, presented lawyers as speakers, misquoted this Court's cases, and counseled their

paying customers that wages are not income, they resembled such snake-oil salesmen of lore. John Cheek bought their desert real estate and their wellness potions. It is certainly not beyond the law's experience that he actually and sincerely believed the party line that those "tax patriots" were peddling. (In any other Circuit, he would have been permitted to have the jury decide that question.)

Indeed, called as a prosecution witness against Cheek was one Anthony Pacelli, a chiropractor from Chicago. (*Tr.* 532-553). Mr. Pacelli testified, as a government witness, that he had listened to the same speakers, joined the same barter association, and set up the same trust as had Cheek. Mr. Pacelli testified that he too stopped paying taxes as a result of what he was told by the tax protesters. Mr. Pacelli stated that the information he was given was "very convincing" to him for several years (*Tr.* 547), and that he believed at the time that he was not violating the law.

Mr. Pacelli, however, settled his problem civilly with the IRS and was not prosecuted (*Tr.* 543). The factual line between the conduct and beliefs of Government witness Mr. Pacelli and the conduct and beliefs of criminal defendant John Cheek is fine indeed, if it exists at all. (Apparently the Government's distinction is that Cheek persisted in his conduct and beliefs longer than did Mr. Pacelli.) No doubt the Government has discretion to make such subtle distinctions when deciding whom to prosecute and whom to attack civilly. But the very subtlety of the line between criminal intent and innocent gullibility in cases such as this eloquently argues that in this area courts should hesitate long before intruding upon the jury's constitutional fact-finding function with a judicial

"pre-emptive strike" such as *Buckner*. That hesitation is doubly counseled because the opinions and conduct of "tax protesters" are ofttimes annoying to both the Government and the judiciary. But we have not, until *Buckner*, marched people off to jail because their view of the world is annoying to us.

No doubt some tax protesters know very well what their tax obligations are, and intentionally refuse to comply. If the Government can convince a jury of that beyond a reasonable doubt, then it may have its conviction. If it cannot carry that burden, the Government still possesses myriad civil and administrative remedies by which not only taxes, but substantial penalties as well, may be collected. There is neither need nor justification for giving the Government the exceptional helping-hand in tax protester cases which *Buckner* represents.

The *Buckner-Cheek* "objectively reasonable" rule is also fraught with practical problems, as the case at bar demonstrated. The District Court was faced with the dilemma of truncating Cheek's evidence of his misunderstanding of his duty to file returns. (*Tr.* 508, 849). This dilemma existed because some of Cheek's beliefs were forbidden under Buckner, and some were not. When both forbidden and other beliefs were commingled in a single document, the court had to redact it. (Sometimes that was not possible. For example, the court admitted a great deal of evidence on the genesis of Cheek's understanding that wages are not income, but an even exchange of labor for money – a belief forbidden by Buckner – because it was impossible to comprehensibly redact Cheek's own testimony about the sequence of events which led to his

misunderstanding. Thus the jury heard considerable evidence which it was later told was irrelevant – surely a sorry state of affairs.)

Another aspect of *Buckner* confused even the Government in this case. The Government (unsuccessfully) took the position at trial that documents, speeches and other such evidence about Cheek's beliefs were relevant to Cheek's state of mind only if Cheek testified that he relied on them. (*Tr.* 425). Under the "objectively reasonable" standard, however, evidence of a given belief's reasonableness would be relevant, even if the particular defendant was not aware of that evidence. This raises the specter under *Buckner-Cheek* of a coterie of tax protester "experts," or lawyers testifying that in their opinion the defendant's views are objectively reasonable. Such testimony would be relevant even if the defendant never relied on the witnesses. Surely the Government cannot intend this result to be the law of the land. But it follows directly from the "objectively reasonable" rule; and, if the Government prevails in this case, tax protester trials may be longer, more complex, and more difficult for district judges to manage.

The better rule, and the rule mandated by *Pomponio* and followed everywhere outside the Seventh Circuit, is to focus the evidence on the willfulness or lack thereof of the defendant – not on a litmus test of his beliefs. Like any other defendant, a tax defendant must produce some evidence to support a "good faith" misunderstanding defense. That traditional evidentiary requirement is sufficient protection against wholly frivolous claims.

The required *Buckner* jury instruction also confounded the District Court and the parties. The initial set of instructions told the jury that an objectively reasonable good faith misunderstanding of the law negates willfulness (*Jt. App.* 74), but the phrase "objectively reasonable" was not defined. The initial instructions also told the jury that Cheek's defense was that he honestly and reasonably believed that he was not a taxpayer (as the statute defines it), that he had been attempting to test the constitutionality of the tax laws, and that his wages did not constitute income. (*Jt. App.* 80-81). After the jury indicated it was deadlocked, the Court tried to explain *Buckner* further by giving a supplemental instruction which flatly contradicted the initial instruction. Having earlier been told that "wages are not income" was part of Cheek's defense, the jury was now told that that belief could not serve as a defense. (*Jt. App.* 88).

The Court in its supplemental instruction also tried to define "objectively reasonable":

> An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfulness.

(*Jt. App.* 88). This "reasonable man" definition should appropriately be left to the negligence/tort cases whence it came. It has no place in a criminal tax trial.

That implementing *Buckner* through jury instructions should confound the learned and experienced trial judge is a powerful statement of *Buckner's* inappropriateness. And the confusion was not limited to the trial judge. The jury too was confused by the instructions throughout its

deliberations. All twelve jurors undertook the extraordinary step of submitting with their verdict their written criticism of what they saw to be a "narrow and hard expression" of the law. (*Jt. App.* 90).

Like the District Court and the jury in this case, moreover, even the Department of Justice had (until this case) shown an aversion to *Buckner*. In recommending jury instructions in tax cases to United States Attorneys' Offices throughout the nation, the Department nowhere urges prosecutors to include an "objectively reasonable" requirement. See CRIMINAL TAX MANUAL, U.S. Dept. of Justice - Tax Division, Criminal Section, U.S. Gov't Printing Office, 1986 Ed. (Proposed Instruction No. 87 for violation of Title 26, U.S.C. Sec. 7203).

The Seventh Circuit may see *Buckner* as a cure for the annoyance of tax protesters. The cure, however, is worse than the perceived ailment. The *Buckner* rule is difficult to apply, unfair, unnecessary, irreconcilably at odds with previous statutory construction, and dangerously close to censorship. *Pomponio* has been the law for many years. The *Pomponio* rule has worked quite well in ten other Circuits when applied to tax protesters. The Government does not need *Buckner*. This Court should reaffirm our system's commitment to trust juries to distinguish the charlatans from the confused.

III

THE BUCKNER-CHEEK RULE VIOLATES THE CONSTITUTION

Buckner presented the District Court with still another major problem. The offenses with which Cheek was

charged were alleged to have been committed between April 1981 and April 1987 (*Jt. App.* 5-15). Cheek's superceding indictment was returned on September 14, 1987 (*Jt. App.* 5). *Buckner* was decided on October 1, 1987, after the dates of the alleged offenses and after the indictment. Yet *Buckner's* "pre-emptive strike" was applied to the trial of Cheek's alleged *pre-Buckner* offenses to eliminate defenses which he would have had *pre-Buckner*. More galling than that, at the time of Cheek's offenses, arguably *United States v. Dack* was the law of the Seventh Circuit, which imposed only a "subjectively reasonable" standard on Cheek's state of mind. Thus, conduct which was not criminal when performed in 1981 through 1987 became criminal after October 1, 1987 (that is, for example, the failure to file returns based on a sincerely-held belief or misunderstanding that wages are not income). This retroactivity offends fundamental notions of fairness.[14] *Marks v. United States*, 430 U.S. 188 (1977). It is also a key and unambiguous element of *Buckner-Cheek*.

What has already been said about *Buckner-Cheek* demonstrates that its construction of the criminal tax statutes also runs foul of the Fifth and Sixth Amendment constitutional standards established by this Court in *Morissette v. United States*, 342 U.S. 246 (1952), and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Let us revisit *Morissette* briefly.

Mr. Morissette went hunting on Government land. He took for his own use metal bomb casings which he

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[14] Cheek continually raised this objection at trial to no avail. (*Tr.* 855, 1259, 1477).

found lying about, believing them to be abandoned. He was convicted of theft of Government property; because he was on Government property at the time, the trial court refused to submit his abandonment defense to the jury. This Court reversed on constitutional grounds. The Court first observed that a "universal and persistent" notion of our system of law is that "injury can amount to a crime only when inflicted by intention." Thus, conviction for theft of Government property required proof of some *mens rea*. The Court then held that the question of *mens rea* or intent was one for the jury to decide, not the trial judge. Thus, when the trial judge decided that Morissette's abandonment defense was unconvincing ("objectively unreasonable") and for that reason refused to submit it to the jury, constitutional error resulted. As this Court held, "A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." 342 U.S. at 275. And, speaking almost prophetically to the Seventh Circuit's *Buckner-Cheek* rule 35 years later, this Court noted: "Such incriminating presumptions are not to be improvised by the judiciary . . . . [J]uries are not bound by what seems inescapable logic to judges . . . . Whether that intent existed, the jury must determine." *Id.* at 275-276.

The criminal tax statutes are, under everyone's theory, specific intent crimes. Thus, *Morissette's* standards must be met if *Buckner-Cheek* is to survive. Even a casual analysis reveals that both prongs of *Buckner-Cheek* – first, that a defendant's bona fide misunderstanding of the law must also be objectively reasonable to constitute a defense, and second, that certain listed misunderstandings

(and some misunderstandings to be identified in the future) can never be defenses – fail this Court's test.

The first prong violates the fundamental rule, articulated in *Morissette*, that a specific intent crime requires for conviction proof that it was "inflicted by intention." *Buckner-Cheek*, by contrast, expressly contemplates a tax conviction when a defendant's misunderstanding is held honestly, sincerely, and in good faith, if the misunderstanding is objectively unreasonable. Thus, the defendant may entirely lack criminal intent or *mens rea*, and yet be convicted because of the failure of his conduct "to measure up to the prescribed standard of conduct." *Murdock, supra* at 396. *Murdock* condemned such a result as a matter of statutory construction; *Morissette* condemns it under our Constitution.[15] John Cheek may not be jailed merely for being stupid, gullible, or unreasonable. He may not be jailed for embracing forbidden beliefs. He may be convicted and jailed only if a jury finds that he acted with criminal intent – a finding which, given the jury's notes in this case, it quite clearly did not make.[16]

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[15] The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. *Morissette, supra* at 263. See also *Lambert v. California*, 355 U.S. 225 (1957).

[16] In *Liparota v. United States*, 471 U.S. 419 (1985), this Court recently reminded the Seventh Circuit that non-*mens rea* offenses are disfavored. This Court reversed a food stamp statute conviction, holding that intent must be inferred as an element.

The second prong of *Buckner-Cheek* (the pre-emptive strike, placing certain beliefs on the "forbidden list" as a matter of law) violates the equally fundamental notion, articulated in *Morissette*, that a defendant has a constitutional right to have a jury decide his guilt or innocence. *Buckner-Cheek* engages in the judicial improvisation condemned by this Court, by barring as a matter of law certain defenses because these defenses fail the Seventh Circuit's litmus test of "objective reasonableness." Implicit in this aspect of *Buckner-Cheek* is an unwillingness to trust juries to decide tax protester cases. But it is not for a court to decide whether a defendant acted in good faith, no matter how obvious the answer appears to the court. As this Court observed in *United States v. Martin Linen Supply Company*, 430 U.S. 564, 572-73 (1977):

> [The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing a jury to come forward with such a verdict, . . . regardless of how overwhelmingly the evidence may point in that direction.

In all contexts save tax protesters, the Seventh Circuit adheres to this fundamental respect for the jury system. As early as 1908, the Seventh Circuit, in *Konda v. United States*, 166 F. 91, 93 (7th Cir. 1908), made this observation:

> Our conclusion is that an accused person has the same right to have twelve laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful

> and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied upon in the plain and simple one.

Thus, it is immaterial that the Court of Appeals and the Government assert that no sane human being could honestly believe that wages are not income. It is not their prerogative to make that final judgment. It is the jury's prerogative – or was until *Buckner-Cheek* took it away.

Buckner-Cheek conclusively presumes that the possession of certain beliefs or understandings about the tax laws can never be reasonable or even sincere – regardless of the circumstances of a particular defendant. This Court's respect for our jury system has made this Court wary of conclusive presumptions generally in criminal cases, especially when the presumption deals with criminal intent. See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985). *Buckner-Cheek's* conclusive presumption deals with defenses to willfulness, but it nevertheless lessens the Government's burden and infringes on the jury's function just as much as the conclusive presumptions condemned in *Sandstrom* and *Francis*.

It is not necessary to elaborate further on these fatal constitutional flaws in *Buckner-Cheek*. That novel rule has no place in a society dedicated to trusting the collective wisdom of a jury to decide guilt or innocence in a criminal case. Because *Buckner-Cheek* is an arrow aimed narrowly and solely at one particularly unloved group of defendants – tax protesters – another constitutional danger must be mentioned, however. *Buckner-Cheek* abandons

all neutrality toward the beliefs of tax protesters (the "repertory of the tax protest movement," according to *Buckner* at 103) by roundly condemning those beliefs, and by announcing that they are impermissible even if honestly held. This is a dangerous thicket for any branch of Government to enter. See generally *Boos v. Barry*, 485 U.S. 312 (1988), and *United States v. O'Brien*, 391 U.S. 367 (1968). As noted earlier, in the Seventh Circuit, a defendant who sincerely believes bribes are not income (and thus misunderstands his duty to report them) has a defense; but a defendant who sincerely believes wages are not income has no defense. What is the difference? Only the Seventh Circuit's conclusion that one belief is respectable and the other is annoying. Where is the right, under this Court's First Amendment cases, for the Government to make such content-related distinctions?

The impact on prosecution decisions is chilling. The Government has virtually unbridled discretion in deciding whom to prosecute from among the universe of income tax non-filers. In the Seventh Circuit, this discretion may now be directed at those "annoying" non-filers who have professed the "forbidden beliefs," because these persons will have no defense. (In the other Circuits, the Government's discretion must be directed at what surely is the only proper criterion for prosecution; that is, which non-filers have acted willfully. *Wayte v. United States*, 470 U.S. 598 (1985).) Thus, *Buckner-Cheek* stands as a "thorn in the side" of the First Amendment, with the capacity to fester into an open wound. This potential First Amendment problem is yet another indicium of the unsoundness of *Buckner-Cheek*.

The *Buckner-Cheek* rule thus violates this Court's constitutional standards under the Fifth and Sixth Amendments. That rule is also inconsistent with the values underlying the First Amendment, because it is not content-neutral (it is, in fact, deliberately not content-neutral) in its application.

CONCLUSION

Solely to deal with the "annoying thorns" of tax protesters, the Seventh Circuit has turned its back on its own precedents, on this Court's longstanding statutory construction, on the decisions in the other Circuits, and on the Constitution itself.

Buckner-Cheek is difficult to apply, unfair, unnecessary, and dangerous.

Our criminal justice system is strong enough and fair enough to deal with tax protesters (and any other annoying defendants) without being untrue to our nation's heritage. This Court should remind the Seventh Circuit of that fact.

For the reasons stated, Petitioner John L. Cheek respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether in this prosecution for willful violation of the criminal tax laws, the district court erred in instructing the jury that willfulness may be negated by petitioner's asserted good faith misunderstanding of the law only if that misunderstanding was objectively reasonable.

2. Whether the jury instructions in this case violated petitioner's right to have the jury determine his guilt or innocence or offended fundamental notions of fairness.

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In the Supreme Court of the United States

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No. 89-658

JOHN L. CHEEK, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 882 F.2d 1263.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16) was entered on August 21, 1989. The petition for a writ of certiorari was filed on October 19, 1989, and was granted on February 20, 1990. The judisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203; three counts of willfully attempting to evade income taxes, in viola-

tion of 26 U.S.C. 7201; and one count of knowingly making a false claim against the United States for income tax withheld, in violation of 18 U.S.C. 287. He was sentenced to imprisonment for a year and a day, placed on five years' probation, and ordered to pay the costs of the prosecution. The court of appeals affirmed. Pet. App. 1-15.

1. a. The evidence at trial showed that petitioner, a college graduate and a pilot for American Airlines, filed federal income tax returns for the years 1969 through 1979. Tr. 119-126, 1150-1151. Thereafter, he engaged in "tax protest" activity.[1] From 1980 to 1986, when his salary rose steadily from approximately $50,000 to $82,000 annually, petitioner did not file any tax return—other than a frivolous return for tax year 1982, for which he was assessed a $500 civil penalty but was not charged criminally. Tr. 125-129, 175-182. His gross income during that period far exceeded the statutory minimum necessary to trigger the filing requirement, which ranged from $3300 to approximately $3600. Tr. 708, 713, 715, 718, 719-721. Based on this course of conduct, petitioner was convicted of willfully failing to file a tax return for

[1] In several prior years, petitioner sought to avoid taxes in a different manner. In 1978, guided by materials distributed by a group called E.S. Publishers, petitioner established a "family trust." He assigned to that trust a portion of his income from American Airlines, took a deduction for that assignment on his personal tax returns for the years 1978 and 1979, and paid personal expenses out of the trust. As a result, his returns for 1978 and 1979 substantially understated his tax liability. J.A. 46-47; Tr. 263-274, 693-702, 1158-1164. Following an audit, the IRS disallowed his deductions for the "family trust." Tr. 235-290. Petitioner's convictions arose out of subsequent tax years and are not based on his use of the "family trust" or the resulting understatement of his tax liability for 1978 and 1979. In 1980, petitioner became a member of the Mid-America Commodities Barter Association, an organization that furnished members a way to have checks received and payments made on their behalf without being traced. Tr. 333-335, 532-555, 1120, 1138-1139, 1191-1193.

the years 1980, 1981, and 1983 through 1986, in violation of 26 U.S.C. 7203 (Counts 2, 4, and 7-10).

Petitioner also filed frivolous W-4 forms claiming an increasing number of withholding allowances, eventually claiming 60 by mid-1980. On W-4 forms filed between 1981 and 1984, he claimed that he was completely exempt from taxation. As a result, for the years 1980, 1981, and 1983, American Airlines withheld substantially less than the amount of tax petitioner owed. Based on the false W-4 forms and other affirmative steps petitioner took to avoid paying taxes, petitioner was convicted of willfully attempting to evade his income taxes for those three years, in violation of 26 U.S.C. 7201 (Counts 1, 3, and 6).[2] For the year 1982, American Airlines withheld approximately $620 more than the estimated amount of petitioner's tax liability. However, petitioner filed a claim for a refund of the entire $16,080 the company withheld. That claim was the basis for petitioner's conviction for presenting a claim to an agency of the United States, knowing the claim to be false and fraudulent, in violation of 18 U.S.C. 287 (Count 5). Pet. App. 2.

b. The evidence showed that as part of his pattern of opposition to the tax system, petitioner filed a number of civil suits and attended trials of other tax protesters.

First, in March 1982, petitioner and another American Airlines employee sued the company and three of its employees to challenge the withholding of federal taxes from their pay. On October 29, 1982, the district court dismissed the complaint, holding that the withholding was proper and observing that the plaintiffs' objections appeared to be frivolous. J.A. 16-20.

Second, petitioner brought a civil action against the IRS in the Tax Court in April 1982, claiming that he was not a "taxpayer" or a "person" for purposes of the Internal Revenue Code, that his salary from American Air-

[2] From 1984 on, American Airlines withheld sufficient amounts to cover petitioner's tax liability. Petitioner nevertheless persisted in his refusal to file tax returns. Tr. 170, 339-356.

lines did not constitute "wages" within the meaning of the Code, that he did not receive taxable "income" when he exchanged his labor for wages, that his wages were not taxable because he did not work for an "employer," that he was not subject to income tax because he was a sovereign individual, that the income tax does not apply to individuals because the word "direct" does not appear in the Sixteenth Amendment to the Constitution, and that the tax laws are ineffective because the Sixteenth Amendment contains no enforcement clause. During the trial of that case in March 1984, the court specifically told petitioner that each of those arguments was frivolous, and it noted that several of the arguments, including that wages are not income, had been consistently rejected in cases across the country. J.A. 21-31.

Third, a federal district court issued an opinion in March 1984 in a separate civil action brought by petitioner and four other persons alleging that wages are not taxable under the Sixteenth Amendment because the value of their labor is the same as the payment they receive for it, and that the withholding of taxes from their wages and payment of those taxes to the government violated the Sixteenth Amendment. J.A. 31-32, 35-36. The district court dismissed the action explaining, inter alia, that the plaintiffs' argument that wages are not income "has repeatedly been held to be without merit." J.A. 35. See *Schaut* v. *United States*, 585 F. Supp. 137, 139 (N.D. Ill. 1984).

Finally, in a suit against various federal officials, petitioner again argued that wages are not taxable income and that the withholding of taxes amounts to an unconstitutional taking of property. The district court dismissed the action on June 16, 1986. Noting that "[t]he constitutionality of the income tax laws enacted pursuant to the Sixteenth Amendment has long been established," the court found petitioner's positions frivolous and imposed sanctions totalling $11,500 against him for bringing the action in bad faith. Pet. App. 2a; J.A. 37-38. In

imposing sanctions, the court observed that "[t]here is no good faith basis for [petitioner's] arguments" and that petitioner had unsuccessfully raised essentially the same arguments in the previous civil action that the district court had decided in March 1984. J.A. 38-39. On appeal, the Seventh Circuit found petitioner's abuse of the system to be "egregious" and fined petitioner $1500 for taking a frivolous appeal. *Cheek* v. *Doe*, 828 F.2d 395 (7th Cir.), cert. denied, 484 U.S. 955 (1987).[3]

The evidence also showed that petitioner had attended at least two criminal trials of other persons charged with similar tax offenses, one in December 1982 and one thereafter. Pet. App. 2a; Tr. 465-470, 494-496, 1367-1368. Petitioner admitted on cross-examination in this case that at the first of those trials, "[b]ased on the Department of Justice's interpretation, I learned that I probably should file an income tax [*sic*]." Tr. 1367. Petitioner further admitted that he heard the jury instructions at the second of those trials, but when asked whether he had "learned what the law was" as a result, he stated: "No, I did not. I learned what Judge Carroll considered the law to be." *Ibid.*

c. Two attorneys who appeared as witnesses for petitioner testified that they had discussed the law of taxation with him. Tr. 959-996, 997-1047, 1058-1103. The first attorney testified that beginning in 1981, she had discussed constitutional issues of taxation with petitioner and knew he was not filing tax returns. Tr. 971-976, 979-980. She also told petitioner that Acts of Congress are binding until they are held unconstitutional by a court and warned him that his conduct could "get him into trouble" and that he could "face a criminal prosecu-

[3] Among the arguments that the Seventh Circuit found frivolous were that wages are not income, that the Sixteenth Amendment was improperly ratified, and that income taxes are unconstitutional takings. 828 F.2d at 398.

tion." Tr. 971, 977-978.[4] The other attorney testified that, during 1980 or 1981, he told petitioner that the courts had rejected as frivolous the claim that wages are not income, Tr. 1034-1035, 1037,[5] and that although the Fifth Amendment provides protection against compelled self-incrimination, "the federal government nevertheless requires the filing of an income tax return." Tr. 1039. He also told petitioner that a person could attack the system from a constitutional standpoint by suing for a refund or damages after the money has been withheld, Tr. 1018, or by putting himself "at risk of criminal prosecution." Tr. 1022.

d. Petitioner admitted during his testimony at trial that he did not file a personal income tax return for the years 1980 through 1986. Tr. 1380. He did not dispute the government's evidence concerning the amount of his gross income from American Airlines during those years or the tax owing on that amount of income under the Internal Revenue Code. And he did not question the obligation under the Code for a person receiving that amount of income to file a return. Petitioner's defense was that his income could not lawfully be taxed. He contended that his wages from American Airlines did not constitute income subject to taxation under the Sixteenth Amendment and the Internal Revenue Code because an exchange of labor for wages does not result in a taxable gain or profit; that a tax on compensation for services is a "direct" tax that is not authorized by the Sixteenth Amendment; that the income tax is "voluntary" for white persons under the Constitution as originally adopted, and he

[4] Petitioner told the attorney about cases of which he was aware in which individuals were prosecuted for willful failure to file tax returns, tax evasion, and filing false W-4 forms. Tr. 982-983. Petitioner also told her of the statement by the judge in his suit against American Airlines that his case was frivolous. Tr. 981-982.

[5] See also Tr. 1084 (attorney told petitioner on several occasions that petitioner's view of the law was inconsistent with interpretations by district and appellate courts).

therefore was not required to pay tax on his wages because he had "withdrawn" from the tax system and was no longer a "taxpayer"; and that to tax income other than on a voluntary basis would amount to involuntary servitude, in violation of the Constitution. See generally Tr. 1206-1243, 1273, 1278, 1304-1367, 1380-1407.

On cross-examination, petitioner acknowledged his familiarity with this Court's decision in *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1 (1916), which held that the income tax provisions of the Tariff Act of 1913, ch. 16, 38 Stat. 166, were consistent with the Sixteenth Amendment. See Tr. 1306-1308, 1353-1355, 1403-1406. The *Brushaber* Court noted (240 U.S. at 17) that Congress's power to tax income from "professions, trades, employments, or vocations" had been recognized in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 635, 637 (1895), even before the adoption of the Sixteenth Amendment. Petitioner also acknowledged familiarity with *Lucas* v. *Earl*, 281 U.S. 111 (1930). In that case, the Court recognized that an individual's salary and fees were income subject to taxation under the Revenue Act of 1918, ch. 18, 40 Stat. 1057, which "impose[d] a tax upon the net income of every individual including 'income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid.'" 281 U.S. at 114. See Tr. 1383, 1406-1408. Petitioner sought to distinguish *Lucas* v. *Earl* on the ground that the taxpayer there was a lawyer, who, in petitioner's view, could constitutionally be subjected to the income tax only because he received a license from the government. Tr. 1406-1408.[6] Finally, petitioner admitted on cross-examination that the judges in his civil actions challenging the income tax laws had told him his positions were frivolous, but he testified that he did not "believe" those judges. Tr. 1368-1369.

[6] Although the point was not brought out on cross-examination, petitioner, as an airline pilot, of course also must have a license from the government. 49 U.S.C. App. 1422.

2. a. At the close of the evidence, the district court instructed the jury that the term "willfully," as used in 26 U.S.C. 7201 and 7203, means "a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent." Pet. App. 20; J.A. 78.[7] The court further explained (Pet. App. 3, 20; J.A. 74-75):

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

The district court also gave an instruction on petitioner's theory of his defense. The court drafted that instruction for petitioner, who represented himself at trial. The instruction described petitioner's theory to be that his wages from American Airlines did not constitute

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[7] The False Claims Act, 18 U.S.C. 287, which formed the basis for petitioner's conviction for seeking a refund of his 1982 taxes, does not contain the word "willfully." It proscribes the submission of a claim to a government agency "knowing" the claim to be false or fraudulent. The jury was instructed that it must find that petitioner "knew" the claim was false, J.A. 79, and that the term "knowingly" means that "the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident." J.A. 74. Petitioner does not appear to challenge the instructions or his conviction on that count.

income under the Internal Revenue Code, and that, because he honestly and reasonably believed he was not required to pay income taxes, he was not required to file tax returns. Pet. App. 3, 21; J.A. 80-81. The instruction also noted petitioner's contention "that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns." Pet. App. 21; J.A. 80.

b. The jury began its deliberations on the morning of November 10, 1988. At 3 p.m. that afternoon, it sent out a note requesting a transcript of the testimony in which petitioner discussed his beliefs. The court denied that request. Pet. App. 3. At 4:15 p.m., the jury sent out a second note, which stated in part (*id.* at 23):

> We have a basic disagreement between some of us as to if [petitioner] honestly & reascnably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 [the theory of defense instruction] is the one we cannot get by as to his belief.

During the ensuing colloquy with the court, the government pointed out that the court had omitted instructions that a person's opinion that the tax laws violate his constitutional rights and disagreement with the government's tax collection do not constitute good faith misunderstandings of the law. The court's response to the jury's note included those instructions. Pet. App. 4; J.A. 86. At 7:10 p.m., the jury sent the court another note, which stated: "We are divided on the issue as to if [petitioner] honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision." Pet. App. 24-25.

c. The jury returned on November 12, and the government asked the court to clarify its instructions before the jury resumed its deliberations. In response, the court gave the jury a second supplemental instruction. That instruction stated, *inter alia*, that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness," and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." Pet. App. 4, 25-26; J.A. 88. The court also repeated its instructions that disagreement with the law is not a defense, "because it is the duty of all persons to obey the law whether or not they agree with it," and that "[p]ersistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law." Pet. App. 26; J.A. 88. The jury deliberated for another 2-1/2 hours and then returned a verdict of guilty on all counts. Pet. App. 4-5.[8]

3. On appeal, petitioner contended that a good faith misunderstanding of the law need not be objectively rea-

[8] The jury submitted several notes that it wanted the court to read after the verdict was announced. Before reading the notes, the court polled the jury, and each juror affirmed that the guilty verdict was his or her own. Pet. App. 4-5. The court then read the notes. The first stated in part: "Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law." *Id.* at 27. The second note, from one of the jurors, stated: "I feel * * * [petitioner] is a reasonable person and sincerely believes in his cause. * * * I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law." *Ibid.* The last note, from another juror, contained two statements. The first read: "'Honest and Sincere in His Cause'—He is *Guilty*." The second read: "Not 'Objectively Reasonable' He Is Guilty." *Ibid.* After reading these notes, the court polled the jury again, and no juror expressed disagreement with the verdict. *Id.* at 5-6.

sonable to negate willfulness. The court of appeals rejected petitioner's position, pointing out that it had "emphatically adhered to the 'objectively reasonable' standard." Pet. App. 6-7. In rejecting petitioner's separate claim that the district court had erred in reinstructing the jury, the court further held that "the beliefs that wages are not income and that the tax laws are unconstitutional are not objectively reasonable as a matter of law." *Id.* at 9.

The court of appeals also stated that a number of other arguments frequently raised by tax protesters are not objectively reasonable, including that the Sixteenth Amendment was improperly ratified; that the income tax violates the Takings Clause of the Fifth Amendment; that filing a tax return violates the Fifth Amendment privilege against compulsory self-incrimination; and that Federal Reserve Notes do not constitute cash or income. Pet. App. 9-10 n.2. Petitioner raised some of those arguments on appeal, as he had in the district court. Specifically, he argued on appeal: (1) that the income tax laws cannot be enforced to tax the compensation of a white Christian male (at least if he has not received a professional license from the State), because such an individual's citizenship does not derive from the Fourteenth Amendment and because he has inalienable rights under the constitution of his State that are protected by the Tenth Amendment; and (2) that the Sixteenth Amendment restricts the taxation of incomes to indirect taxes, and he had engaged in no "indirect taxable activity." For these reasons, petitioner argued, an income tax could be assessed against his compensation only on a "voluntary" basis, and any such basis was lacking here because he had renounced any voluntary use of the federal debt, denied all state-created franchises, and revoked or rescinded his Social Security numbers, past tax returns, and associated forms. See C.A. Br. 36-42; Reply Br. 15-16. The court of appeals dismissed petitioner's various legal objections to the income tax as "absurd." Pet. App. 10 n.2.

SUMMARY OF ARGUMENT

I. This case presents a question of statutory construction concerning the scope of the defense of ignorance or mistake of law that is encompassed by the term "willfully" under two criminal tax statutes, 26 U.S.C. 7201 and 7203. The district court instructed the jury that the term "willfully" means "a voluntary, intentional violation of a known legal duty." That is the very standard of willfulness that petitioner urges, and it is drawn verbatim from *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), and *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976), upon which petitioner relies. Petitioner objects to the district court's further instruction that an objectively reasonable and good faith misunderstanding of the law negates willfulness. But that instruction afforded petitioner added protection, because even if the jury found that he was aware of the legal duties imposed by the Internal Revenue Code, the jury nevertheless was required to acquit him if it found that he reasonably and in good faith concluded that there was some legal ground that excused him from performing those duties. It was entirely fair to place a limit of objective reasonableness on this extension of the defense of ignorance or mistake of law.

A. The text of 26 U.S.C. 7201 and 7203 cuts against a defense that gives dispositive effect to the defendant's subjective beliefs about the law. Those Sections make it an offense for a person "willfully" to evade a "tax imposed by this title" or fail to file a "return * * * required by this title." Because willfulness, as construed in *Bishop* and *Pomponio*, generally connotes an intentional violation of a "known legal duty," Sections 7201 and 7203, on their face, require only that the defendant know of the "tax imposed by [Title 26]" and the "return * * * required by [Title 26]." That was true here. Petitioner argues, however, that even where a person is aware of the duty under the Code to pay taxes on wages and to file tax returns, he is not guilty of an offense if he did

not subjectively "believe" in that view of the law, no matter how outlandish his belief. This extension of the defense of ignorance or mistake of law is not compelled by the term "willfully." Although a limited mistake of law defense may properly be implied under Sections 7201 and 7203, it should apply only where the defendant's "belief" that he need not comply with known statutory requirements was held in good faith *and* was objectively reasonable.

B. The "objectively reasonable" limitation on the defense of ignorance or mistake of law is supported by this Court's seminal decision under the criminal tax laws, *United States* v. *Murdock*, 290 U.S. 389 (1933). There, the Court explained that in a criminal statute, the term "willfully" generally means an act done without a "justifiable excuse"; without "ground for believing it is lawful"; "stubbornly, obstinately [or] perversely"; or in "careless disregard whether or not one has the right so to act." *Id.* at 394-395. Each of these formulations supports an objective limitation on the extent to which a subjective belief about the law will negate willfulness, and each aptly describes petitioner's conduct in this case.

Moreover, the Court held in *Murdock* that the Court should have submitted to the jury the particular defense at issue only because the law was uncertain at the time. The defendant's legal position therefore was not "so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing." 290 U.S. at 396. The clear implication is that if the law had not been unsettled at the time of the defendant's conduct, the trial court would not have been required to submit the issue to the jury. In this case, because the text and judicial construction of the Internal Revenue Code and the Constitution conclusively refute petitioner's various legal theories, his adamant refusal to pay taxes and file returns is so "unreasonable and ill founded" that the district court was not required to submit to the jury the question of petitioner's good faith belief in those legal

theories. This conclusion is fully consistent with *Bishop*, *Pomponio*, and *Sansone* v. *United States*, 380 U.S. 343 (1965), which involved alleged good faith mistakes of fact, not law.

C. The approach we propose will preclude liability based on " 'innocent errors made despite the exercise of reasonable care' " and will "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." *United States* v. *Bishop*, 412 U.S. at 360-361, quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943). At the same time, it will "induce prompt and forthright fullfillment of every duty under the income tax law," *Spies* v. *United States*, 317 U.S. at 497, by discouraging individuals from clinging to frivolous views of the law in the hope of convincing a jury of their sincerity.

D. The legal objections to the tax system that petitioner advanced at trial do not satisfy the standard of "objective reasonableness." In fact, they are frivolous. Moreover, petitioner's objections are essentially beliefs that the income tax violates the Constitution. The courts have uniformly held that a belief that the Internal Revenue Code is unconstitutional does not negate the element of willfulness under the criminal tax statutes. That conclusion is supported by *Reynolds* v. *United States*, 98 U.S. 145, 166-167 (1878), and the public interest in discouraging defiance of duly enacted laws on the basis of a personalized finding of unconstitutionality.

E. Petitioner's submission that his violation of known legal duties should be excused, no matter how indefensible his subjective "belief," is also inconsistent with general principles of mens rea under the criminal law. Under those principles, a person acts "knowingly"—the level of culpability petitioner urges—if he is "aware" of the relevant circumstances (here, the requirements of the law). In other words, knowledge is a matter of *cognition*. By contrast, petitioner appears to use the term "belief" to refer to matters of personal faith and conviction, as demonstrated by his claim that the jury instructions in this

case violated the First Amendment by singling him out on the basis of his beliefs. As *Reynolds* v. *United States* holds, a person is not excused from liability for his conduct simply because it was motivated by a subjective belief in the justness or soundness of his cause.

II. A. Application of the "objectively reasonable" limitation here does not constitute retroactive expansion of a criminal statute in violation of the Due Process Clause. Petitioner was put on notice of this element of a mistake-of-law defense by *Murdock* and *United States* v. *Moore*, 627 F.2d 830, 833 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981). And because petitioner's objections boil down to the proposition that the Internal Revenue Code is unconstitutional, *Reynolds* v. *United States* established that his beliefs would not furnish a defense.

B. The jury instructions did not eliminate the element of mens rea under the criminal tax statutes, because they required a finding that petitioner intentionally violated a known legal duty. Nor was petitioner's right to have the jury decide his guilt or innocence violated by the instruction that his beliefs that wages are not income, and that the tax laws are unconstitutional, were not objectively reasonable. The latter belief is not a defense under the criminal tax statutes. Moreover, the question whether a particular belief about the law is objectively reasonable is essentially a question of law for the court. And even if that question should be submitted to the jury in a close case, it was not necessary to do so here, because petitioner's beliefs about the law had been uniformly rejected by the courts and no reasonable jury could have found in his favor on the basis of those beliefs.

ARGUMENT

I. A TAXPAYER ACTS "WILLFULLY" IF HE IS AWARE OF THE REQUIREMENTS OF THE TAX CODE BUT REFUSES TO ACCEPT THEM BASED ON A THEORY THAT IS OBJECTIVELY UNREASONABLE OR A BELIEF THAT THE REQUIREMENTS ARE UNCONSTITUTIONAL.

This case presents a question of statutory construction concerning the content of the term "willfully" in two criminal tax statutes, 26 U.S.C. 7201 and 7203. In particular, it concerns the scope of the defense of ignorance or mistake of law that may appropriately be read into that statutory term. Our submission is this: Under *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), and *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976), the element of willfulness in the federal criminal tax statutes generally requires proof that the defendant intentionally violated a known legal duty. As a result, when a defendant is unaware of the duties the tax laws impose on him, he does not act willfully if he fails to file a return or underpays his taxes. When, however, the defendant is aware of the pertinent requirements of the tax laws, but defends his failure to comply with them by asserting the belief that those requirements may not lawfully be applied to him, he may not avoid conviction unless his belief is objectively reasonable. He also may not avoid conviction on the basis of an asserted belief that the tax laws are unconstitutional.

Petitioner's basic submission (Br. 13, 16, 20, 23, 25) is that when the district court instructed the jury that his assertedly good faith misreading of the law must be "objectively reasonable," it altogether deprived him of a valid defense of "ignorance of the law", or "mistake of law." Petitioner's actions, however, were quite different from the sort of conduct for which that defense has been fashioned, based on considerations of fair notice and a concern that certain errors of law are not blameworthy.

Simply put, petitioner did not act in "ignorance" of the law or make a "mistake" about his obligations under the law. He unquestionably knew that the Internal Revenue Code, as written, requires a person having his income to file a return and pay taxes. That much is established by the fact that petitioner filed returns and paid taxes on his income from American Airlines (and prior employers) for ten years before he commenced the course of conduct that led to the convictions he now asks the Court to overturn. Any conceivable doubt on that score is dispelled by the fact that petitioner filed a number of lawsuits challenging the income tax laws, and the withholding of taxes from his income, on many of the same legal theories he subsequently presented in his defense in this criminal prosecution, and in each instance the court informed petitioner that his legal positions were frivolous. It follows that petitioner's actions did not stem from "ignorance" or "mistake." Knowing full well what was expected of him, petitioner intentionally and obdurately refused to perform the most basic duties of a citizen under the tax laws—duties that are acknowledged and respected by virtually all of the millions of wage earners in this country. Petitioner's actions were therefore far removed from the sort of innocent or blameless conduct for which the defense of ignorance or mistake of law is properly reserved.[9]

Petitioner's complaints about the jury instructions in this case also ignore the central instruction on the question of willfulness. The district court specifically instructed the jury that the term "willfully" in 26 U.S.C. 7201-7203 means "a voluntary, intentional violation of a known legal duty." Pet. App. 20; J.A. 78. That is the very standard of willfulness that petitioner urges (Br.

[9] Petitioner now attempts (Br. 4-5, 32, 39) to portray himself as a gullible and misguided victim caught up in the tax protest movement. That was not his defense in the courts below, where he argued that the tax laws could not constitutionally be applied to him. Petitioner has abandoned those arguments in this Court.

18-19), drawn directly from language in *United States* v. *Bishop*, 412 U.S. at 360, and *United States* v. *Pomponio*, 429 U.S. at 12.[10]

The district court further instructed the jury that "[a]n objectively reasonable good faith misunderstanding of the law negates willfulness," and that such a good faith "misreading of the law" may be based on the defendant's own legal research or the advice of an attorney, as long as the defendant "honestly and reasonably believe[s] his research or the advice." Pet. App. 20; J.A. 74-75. Petitioner objects to the requirement of objective reasonableness in this additional instruction. He fails to appreciate, however, that the instruction added to, rather than detracting from, the protections afforded by the basic willfulness instruction he endorses. Thus, under the court's instructions, the jury was required to acquit petitioner if it found that he was not aware of the legal duty under the Internal Revenue Code to pay taxes and file tax returns. And even if the jury found that petitioner *was* aware of the requirements of the Code, it could not conclude that he acted willfully if it found that he reasonably and in good faith concluded that there was some legal ground that excused him from having to comply with those requirements.

Contrary to petitioner's contention, there is nothing unfair about the requirement of objective reasonableness in the latter instruction, because it imposes a sound limitation on the extent to which a taxpayer may, with impunity, act in knowing contravention of the law as written or as construed by the responsible agency or

[10] In the court of appeals, petitioner argued (C.A. Br. 25-29) that the district court erred in its supplemental instructions to the jury because, inter alia, the court did not repeat the instruction referring to an "intentional violation of a known legal duty," and the jury therefore might have been misled into believing that it was not required to make that finding in order to convict him. The court of appeals rejected petitioner's objection to the manner of reinstruction, Pet. App. 7-12, and he does not renew that claim here.

the courts. As we shall show, such a limitation is supported by the text and purposes of the criminal tax laws, by this Court's decisions construing those laws, and by general principles of criminal culpability.[11]

[11] Petitioner errs in contending (Br. 19-21) that the jury instructions approved by the Seventh Circuit in this case would be rejected by ten other courts of appeals. The Second Circuit has stated that an instruction requiring objective reasonableness would be appropriate. *United States* v. *Schiff*, 801 F.2d 108, 112 (1986), cert. denied, 480 U.S. 945 (1987). The Third Circuit recently observed that it had not yet resolved the validity of such an instruction, and it expressly left that question open. *United States* v. *Connor*, No. 89-3614 (Mar. 21, 1990), slip op. 8. The Ninth Circuit likewise has indicated that it has not yet definitively resolved that question. Compare *Cooley* v. *United States*, 501 F.2d 1249, 1253 n.4 (1974), cert. denied, 419 U.S. 1123 (1975), with *United States* v. *Mueller*, 778 F.2d 539, 541 (1985), and *United States* v. *Aguilar*, 883 F.2d 662, 674-675 & nn. 5, 6 (1989). In *Yarbrough* v. *United States*, 230 F.2d 56, 61 (1956), cert. denied, 351 U.S. 969 (1956), cited by petitioner (Br. 20), the Fourth Circuit simply stated that "ignorance of the law" can constitute a defense under the criminal tax laws, a position that is fully consistent with the district court's instructions in this case and our submission herein. In *Battjes* v. *United States*, 172 F.2d 1, 4 (1949), cited by petitioner (Br. 20), the issue concerned an instruction that the defendant was presumed to know the law, and the Sixth Circuit did not specifically address the issue presented here; more recently, the Sixth Circuit indicated that an instruction concerning a "known legal duty" is sufficient. *United States* v. *Sassak*, 881 F.2d 276, 279-280 (1989). Thus, there is no concluded view in the majority of circuits that conflicts with our submission here.

The reasoning in the decisions of other courts of appeals that petitioner cites does not lend much persuasive force to those conflicting circuit precedents. For the most part, those decisions simply rely on the *Bishop* and *Pomponio* formulation of an "intentional violation of a known legal duty," which was in fact followed in this case. Those decisions also do not address the arguments presented herein or explain how the purely subjective approach can sensibly be applied where, as here, the defendant is fully aware of the legal duties imposed by the relevant statutory provisions.

A. The Objective Reasonableness Requirement Is Consistent With The Text Of 26 U.S.C. 7201 And 7203

Because this case presents a question of statutory construction—the scope of the defense of ignorance or mistake of law under the criminal tax laws—it is necessary to begin with the text of the relevant statutory provisions, 26 U.S.C. 7201 and 7203. See *United States* v. *Yermian*, 468 U.S. 63, 68 (1984). Section 7201 provides criminal sanctions for a person who "willfully attempts in any manner to evade or defeat any tax imposed by this title [Title 26 of the United States Code] or the payment thereof." Section 7203 provides criminal sanctions for any person who is "required by this title or by regulations made under authority thereof to make a return * * * [and] who willfully fails * * * [to] make such return."

Sections 7201 and 7203 do not expressly state whether a defendant must be aware of the requirements of Title 26 (or implementing regulations) that he pay taxes or file a return. Nor does either Section state that ignorance of those requirements is a defense. As a result, any such refinements on the nature of the offense under 26 U.S.C. 7201 and 7203 must be derived from the word "willfully" in each Section.

The tax statutes do not define "willfully," and the legislative history of those statutes is not instructive as to its meaning. *United States* v. *Bishop*, 412 U.S. at 356; *Spies* v. *United States*, 317 U.S. 492, 495 (1943). Moreover, this Court has repeatedly stated that the word "willful" is "a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U.S. at 497; *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion). It therefore has fallen to this Court to give content to the term "willfully" in different contexts, taking into account the underlying policies of the criminal tax statutes that are implicated in the particular setting.

The Court has stated that the term "willfully" under the criminal tax statutes "generally connotes a voluntary,

intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. at 360; *United States* v. *Pomponio*, 429 U.S. at 12. Under this formulation, it would appear to be sufficient to establish a criminal violation in a case such as this if the defendant was aware of the requirements imposed by the Internal Revenue Code to pay taxes and file tax returns. That conclusion is consistent with the text of Sections 7201 and 7203. The language of the two statutes permits the construction that the knowledge component of the term "willfully" applies to whether a tax is "imposed by this title" or filing a return is "required by this title or by regulations made under authority thereof." This construction of the statute is sufficiently embodied in jury instructions that require the government to prove that the defendant was aware of the duties imposed by the basic requirements of the Code. If the defendant is not aware of those requirements, then ignorance of the law is, to that extent, a defense. As we have explained, the instructions in this case were consistent with such a construction of 26 U.S.C. 7201 and 7203, because they defined willfulness as an "intentional violation of a known legal duty."

Petitioner's submission goes much further, however. He argues that even where a person is aware of the relevant statutory provisions that impose legal duties (or of administrative or judicial interpretations of those provisions), he is not guilty of an offense if he does not subjectively "believe" that the law is or should be as stated in the statutory text or authoritative interpretations of that text. That defense—which is not really one of "ignorance" or "mistake" of law—has a far broader reach than is suggested by the text of 26 U.S.C. 7201 and 7203 and by this Court's statements in *Bishop* and *Pomponio* concerning what the term "willfully" generally means under those statutes. The question presented here is the extent (if any) to which this further defense should be read into the criminal tax statutes by implication. In our view, this Court's decisions and

the policies of the criminal tax statutes do permit some accommodation of this implied defense, but only when subject to appropriate limitations—namely, that the defendant's "belief" that he need not comply with applicable statutory requirements was held in good faith and was objectively reasonable.[12]

B. This Court's Decisions Support The Use Of An Objective Standard In Assessing A Defendant's Refusal To Acknowledge His Duties Under The Tax Code

1. The Court's seminal decision construing the term "willfully" under the criminal tax laws is *United States* v. *Murdock*, 290 U.S. 389 (1933). The taxpayer in *Murdock* was charged with willfully failing to supply information, in violation of Section 1114(a) of the Revenue Act of 1926, ch. 27, 44 Stat. 116, the predecessor to 26 U.S.C. 7203. The trial court instructed the jury of its view that the government had sustained the burden of establishing the defendant's guilt, and it refused to give the following instruction requested by the defendant (290 U.S. at 393):

> If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful.

The Court held that, in the circumstances presented, the trial court should have given this instruction and should

[12] In considering the scope of this implied extension of the defense of ignorance or mistake of law under the criminal tax statutes, it is important to keep in mind that any such defense is an exception to the deeply rooted principle that ignorance or mistake of law ordinarily is not a defense to a criminal prosecution. See *United States* v. *Barlow*, 32 U.S. (7 Pet.) 404, 411 (1833); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 85-86 (1908); *Lambert* v. *California*, 355 U.S. 225, 228 (1957); *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 562-563 (1971).

not have informed the jury of its view that the evidence established willfulness. Both the Court's discussion of the meaning of the term "willfully" and the Court's application of that term strongly support the conclusion that the rule of objective reasonableness properly limits the extent to which a taxpayer's assertedly good faith "belief" about his obligations under the tax laws negates the element of willfulness.

The Court first concluded in *Murdock* that the term "willfully," as used in criminal statutes, means more than "voluntarily" (290 U.S. at 394-395 (citations omitted)):

> The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

This elaboration upon the concept of willfulness has both subjective and objective components, and an analysis of the illustrative formulations it contains shows why *Murdock* is at odds with the position petitioner advocates.[13]

First, the requirement that the "excuse" proffered by a defendant for his illegal act must be "justifiable" suggests that the defendant may not rely on any belief, no matter how unreasonable or indefensible. Accord *Potter*

[13] Petitioner argues (Br. 17 & n.8) that the quoted passage from *Murdock* was not intended to reflect the Court's construction of the term "willfully," as used in the Revenue Act of 1926, but was intended as a list of alternative constructions of the term that the Court did *not* mean to apply to the Revenue Act. The context of the discussion rebuts that claim, as does a subsequent decision in which the Court made it clear that the quoted passage was, indeed, intended as part of the Court's construction of the Revenue Act. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 127 (1985).

v. *United States*, 155 U.S. 438, 446 (1894); *Felton* v. *United States*, 96 U.S. 699, 702 (1877) (both cited by the Court in *Murdock*). Second, the Court did not state that a willful act is a thing done without actually "believing" it to be lawful; the Court stated that a willful act is a thing done without "*ground* for believing" it to be lawful, which suggests that the defendant's subjective belief must have at least some concrete basis in extrinsic circumstances. Third, the phrase "stubbornly" obstinately [or] perversely" aptly describes petitioner's course of conduct in this case, which he pursued in knowing disregard of the requirements of the Code. Fourth, *Murdock*'s standard of "careless disregard" for whether the laws afforded the defendant the right to act as he did supports the recognition here of some objective limitation on the extent to which petitioner may be excused for defying requirements in the tax laws of which he was fully aware. See 290 U.S. at 394-395.[14]

The Court's disposition of the defendant's claim in *Murdock* lends further support to the court of appeals' disposition of petitioner's claim in this case. The *Murdock* Court concluded that the district court should have given the instruction requested by the defendant—namely, that if the jury found his reasons for refusing to answer were given in good faith and based upon his actual belief, the jury should "consider that in determining whether or not his refusal to answer the questions was wilful." 290 U.S. at 393. By the same token, the Court concluded that the trial court should not have instructed the jury that in the court's view the government had established willfulness. The Court explained that, although an intervening ruling made clear that the defendant did not have a right to withhold information based on his privilege against compelled self-incrimination, he reasonably could have believed otherwise at the time. For that reason, the Court concluded, the trial court should not have told the jury that the defendant's assertion of the privilege "was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing." 290 U.S. at 396.

[14] The references in *Murdock* to a "bad purpose" or "evil motive" (290 U.S. at 394, 395) simply refer to a specific intent to violate the law—generally, an intentional violation of a known legal duty. *United States* v. *Pomponio*, 429 U.S. 10, 11-12 (1976).

The clear implication of this explanation is that if the Fifth Amendment question had *not* remained open at the time the defendant refused to answer, the trial court would *not* have been required to give the instruction requested by the defendant concerning his asserted good faith belief in his right to assert the privilege. Because an assertion of the privilege in those circumstances would be "so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing," the trial court would have been justified in declining to submit to the jury the issue of the defendant's good faith and actual belief in his right to do so. That would have been especially so if the defendant knew the state of the law. See *Browder* v. *United States*, 312 U.S. 335, 341 (1941) (characterizing *Murdock* as a case involving lack of willfulness because the defendant had a "reasonable" fear of self-incrimination based on uncertainty in the law at the time).[15]

In this case, because the text and judicial construction of the Internal Revenue Code and the Constitution conclusively refute the view that wages are not income, and because the courts have uniformly found petitioner's other constitutional objections to the income tax to be frivolous, his adamant refusal to pay taxes and file returns was wholly "unreasonable and ill founded" and therefore "willful" under *Murdock*.[16] The district court

[15] Cf. *Screws* v. *United States*, 325 U.S. at 104-105 (plurality opinion) (willfulness established under predecessor to 18 U.S.C. 242 when defendant acts in open defiance or reckless disregard of constitutional rights that have been made specific and definite).

[16] The instruction that the Court held should have been given in *Murdock* did not state that the jury must acquit the defendant if it found his reasons for refusing to supply information were given in

therefore was not required by *Murdock* to instruct the jury that it must acquit petitioner if it found that he nevertheless subjectively believed that wages are not income or that the Internal Revenue Code is unconstitutional on this or other grounds. It follows that the district court did not err in instructing the jury that those beliefs are "not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." Pet. App. 4, 25-26; J.A. 88.

2. Petitioner relies (Br. 17-19) on this Court's decisions in *Sansone* v. *United States*, 380 U.S. 343 (1965); *United States* v. *Bishop*, 412 U.S. 346 (1973); and *United States* v. *Pomponio*, 429 U.S. 10 (1976). But those decisions do not suggest that objective reasonableness has no role to play in the defense of mistake or ignorance of the law under the criminal tax statutes. Rather, in *Sansone*, *Bishop*, and *Pomponio*, the Court construed the term "willfully" in the context of alleged good faith mistakes of fact, not law. In none of those three cases did the Court directly address the issue of the role of the reasonableness test as applied in the context of a mistake of law defense.

To be sure, in *Bishop* the Court discussed the general principles underlying the willfulness requirement in the criminal tax statutes, but its discussion supports our construction of the term, not petitioner's. The Court explained that "[i]n our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and that "'[i]t is not the purpose of the [criminal tax] law to penalize frank difference

good faith and based upon his actual belief. The instruction stated only that the jury should "consider" its finding of good faith and actual belief in determining whether the defendant's refusal was willful. 290 U.S. at 393. *A fortiori*, *Murdock* does not suggest that a jury must be instructed to give dispositive effect to a defendant's claimed good faith belief where, as here, the state of the law regarding an individual's obligation to pay income tax on wages and to file returns as required by the Internal Revenue Code was not at all unsettled at the time the defendant acted.

of opinion or innocent errors made despite the exercise of reasonable care.'" 412 U.S. at 360-362, quoting *Spies* v. *United States*, 317 U.S. at 496. The reference to "reasonable care" suggests the propriety of objective reasonableness as a limitation on any "mistake of law" defense. Moreover, there is nothing in the Court's discussion that is inconsistent with the existence of a reasonableness restriction on the defense of mistake or ignorance of the law where, as here, the defendant knew of the requirements of the Internal Revenue Code (and decisions arising under it) but simply refused to accept the explicit terms of the Code, authoritative constructions of the Code, and the constitutionality of its most basic provisions.[17]

C. The Policies Of The Criminal Tax Statutes Support A Limitation Of Objective Reasonableness

The jury instructions given by the district court in this case also are supported by the policies of the criminal tax laws and the *mens rea* requirement in those laws. Congress has recognized the practical reality that "the [tax] law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appears from the number who make overpayments." *Spies* v. *United States*, 317 U.S. at 496. Accordingly, "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Ibid.* That policy was reiterated in *United States* v. *Bishop*, 412 U.S. at 360-361, where the Court stated that its

[17] Elsewhere in *Bishop*, the Court stated that "[t]he requirement of an offense committed 'willfully' is not met * * * if a taxpayer has relied in good faith on a prior decision of this Court." 412 U.S. at 361. Such reliance would establish that a mistake of law was objectively reasonable. The Court's reference to that point further suggests that objective reasonableness does indeed have an important role to play in determining the availability of the mistake-of-law defense.

"consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." There is no question, therefore, that an innocent or negligent oversight is not to be equated with willfulness. See, *e.g.*, *United States* v. *Aitken*, 755 F.2d 188, 191 (1st Cir. 1985).

The policies underlying the tax laws do not, however, suggest that the willfulness standard should be interpreted to shelter an individual who is aware of the requirements of the tax laws but seeks to justify disobedience by resorting to claimed beliefs that are unreasonable or frivolous. An individual who is aware of the requirements of the tax laws, such as the requirement to pay taxes on his wages, but seeks to exempt himself through reliance on some frivolous proposition is not a victim of the complexity of the tax laws when he is punished for his unlawful conduct. Nor can his violation be characterized as an "innocent error[] made despite the exercise of reasonable care." *Spies* v. *United States*, 317 U.S. at 496. Yet, the purely subjective approach to the question of willfulness advocated by petitioner would allow the jury to acquit that person if it believed that he was convinced of the correctness of the proposition.

Such a result would be inconsistent with the objectives of the system of sanctions under the tax laws. Focusing exclusively on whether a person really believes in a legal theory, regardless of how unreasonable that theory may be, would not "induce prompt and forthright fulfillment of every duty under the income tax law," *Spies* v. *United States*, 317 U.S. at 497, but instead would encourage disobedience of the law. A person who was aware of his duties under the tax laws and recognized that a particular theory for escaping taxes was contrary to the plain language of the tax statutes or judicial decisions—including decisions of this Court—could violate the law

without fear of criminal sanctions as long as he could convince a jury that he sincerely believed his theory for exempting himself from taxation.

The exclusively subjective test would be especially inappropriate in cases where, as here, a belief is objectively unreasonable because it is foreclosed by judicial decisions of which the defendant is aware. Where an individual clings to a theory despite his awareness of judicial decisions firmly rejecting that theory, he "knows" his duty, even if he refuses to believe that the courts are correct. Under the purely subjective test, however, the individual's refusal to acknowledge the correctness of well-settled legal rules would be sufficient to negate willfulness. Thus, the subjective test would invite individuals to abide by their own interpretations of the law without fear of criminal prosecution, thereby undermining the uniform enforcement of the tax laws.

D. Petitioner's Legal Arguments Do Not Constitute A Defense Under The Objective Reasonableness Standard

The court of appeals was clearly correct in holding that the legal arguments petitioner raised in his defense to the charges under 26 U.S.C. 7201 and 7203 were not objectively reasonable. In fact, as the courts in petitioner's various civil actions repeatedly informed him, those arguments are utterly frivolous. Moreover, it is well established that a belief that the tax laws are unconstitutional does not furnish a defense.

a. The courts have unanimously rejected the proposition that wages are not income and therefore are not subject to the federal income tax laws.[18] As a statutory

[18] See *Sullivan* v. *United States*, 788 F.2d 813, 815 (1st Cir. 1986); *Ficalora* v. *CIR*, 751 F.2d 85 (2d Cir. 1984), cert. denied, 471 U.S. 1005 (1985); *United States* v. *Connor*, No. 89-3614 (3d Cir. Mar. 21, 1990), slip op. 3-4; *United States* v. *Graham*, 758 F.2d 879, 886-887 (3d Cir.), cert. denied, 474 U.S. 901 (1985); *United States* v. *Burton*, 737 F.2d 439, 441 (5th Cir. 1984); *United States* v. *Koliboski*, 732

matter, this is evident from the face of the Internal Revenue Code, which defines "gross income" to mean "all income from whatever source derived, including (but not limited to)" "[c]ompensation for services, including fees, commissions, fringe benefits, and similar items." 26 U.S.C. 61(a)(1). Petitioner does not contend otherwise. Moreover, this Court's decisions in *Brushaber* v. *Union Pacific R.R.*, *supra*, *Pollock* v. *Farmers' Loan & Trust Co.*, *supra*, and *Lucas* v. *Earl*, *supra*, make clear that income from employment is subject to the income tax and that such taxation is authorized by the Constitution.

The courts have likewise uniformly rejected the additional objections to the income tax that were identified by the court below and that have been raised by petitioner and other tax protesters: (1) that the Sixteenth Amendment was improperly ratified and therefore never came into effect;[19] (2) that the income tax violates the Just Compensation Clause of the Fifth Amendment;[20] (3) that the tax laws are broadly unconstitutional in other respects;[21] (4) that filing a tax return necessarily violates

F.2d 1328, 1329 n.1 (7th Cir. 1984); *United States* v. *Richards*, 723 F.2d 646, 648 (8th Cir. 1983); *United States* v. *Buras*, 633 F.2d 1356, 1361 (9th Cir. 1980); *United States* v. *Lawson*, 670 F.2d 923, 925 (10th Cir. 1982); *Hyslep* v. *United States*, 765 F.2d 1083, 1084 (11th Cir. 1985).

[19] See *United States* v. *Sitka*, 845 F.2d 43, 45-47 (2d Cir.), cert. denied, 488 U.S. 827 (1988); *Knoblauch* v. *CIR*, 749 F.2d 200, 201-202 (5th Cir. 1984), cert. denied, 474 U.S. 830 (1985); *Sisk* v. *CIR*, 791 F.2d 58, 60-61 (6th Cir. 1986); *United States* v. *Thomas*, 788 F.2d 1250, 1253-1254 (7th Cir.), cert. denied, 479 U.S. 853 (1986); *Axmann* v. *Ponte*, 892 F.2d 761 (8th Cir. 1990); *United States* v. *Stahl*, 792 F.2d 1438 (9th Cir. 1986), cert. denied, 479 U.S. 1036 (1987); *Stubbs* v. *CIR*, 797 F.2d 936, 938 (11th Cir. 1986).

[20] *Brushaber* v. *Union Pac. R.R.*, 240 U.S. at 24-25; *Coleman* v. *CIR*, 791 F.2d 68, 70 (7th Cir. 1986); *Campbell* v. *Amax Coal Co.*, 610 F.2d 701, 702 (10th Cir. 1979) (withholding on wages).

[21] *United States* v. *Carley*, 783 F.2d 341, 342 (2d Cir.), cert. denied, 476 U.S. 1142 (1986); *Sauers* v. *CIR*, 771 F.2d 64, 69 n.6 (3d Cir. 1985), cert. denied, 476 U.S. 1162 (1986); *Melton* v. *Kurtz*,

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the privilege against compulsory self-incrimination;[22] and (5) that Federal Reserve Notes do not constitute cash or income.[23]

Petitioner does not seriously dispute the conclusion by the court below and other courts that these arguments are not objectively reasonable and, indeed, are frivolous. There is no reason why an individual's adherence to such frivolous positions, in spite of his awareness that they are at odds with the terms of the Internal Revenue Code, should excuse his deliberate refusal to file income tax returns and his attempts to evade the assessment or collection of taxes. This is not a case in which petitioner claims he was unaware of his duties under the tax laws. His defense was that while he was aware of those duties, he did not believe they could properly be imposed on him.

b. Moreover, petitioner's beliefs regarding his immunity from obligations imposed by the Internal Revenue Code are essentially beliefs that the tax laws violate the

575 F.2d 547, 548 (5th Cir. 1978); *Lively* v. *CIR*, 705 F.2d 1017, 1018 (8th Cir. 1983); *Maxfield* v. *United States Postal Service*, 752 F.2d 433, 434 (9th Cir. 1984); *Charczuk* v. *CIR*, 771 F.2d 471, 474 (10th Cir. 1985).

[22] *United States* v. *Edelson*, 604 F.2d 232, 234-235 (3d Cir. 1979); *United States* v. *Reed*, 670 F.2d 622 (5th Cir.), cert. denied, 457 U.S. 1125 (1982); *United States* v. *Evanko*, 604 F.2d 21, 23 (6th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); *United States* v. *Jordan*, 508 F.2d 750, 752 (7th Cir.), cert. denied, 423 U.S. 842 (1975); *United States* v. *Karsky*, 610 F.2d 548, 550-551 (8th Cir. 1979), cert. denied, 444 U.S. 1092 (1980); *United States* v. *Neff*, 615 F.2d 1235, 1238-1241 (9th Cir. 1979), cert. denied, 447 U.S. 925 (1980); *United States* v. *Lawson*, 670 F.2d at 927; *United States* v. *Vance*, 730 F.2d 736, 737-738 (11th Cir. 1984).

[23] *United States* v. *Edelson*, 604 F.2d at 233-234; *United States* v. *Whitesel*, 543 F.2d 1176, 1180-1181 (6th Cir. 1976), cert. denied, 431 U.S. 967 (1977); *United States* v. *Moore*, 627 F.2d 830, 833 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *United States* v. *Daly*, 481 F.2d 28, 30 (8th Cir.), cert. denied, 414 U.S. 1064 (1973); *United States* v. *Schmitz*, 542 F.2d 782, 785 (9th Cir. 1976), cert. denied, 429 U.S. 1105 (1977); *United States* v. *Porth*, 426 F.2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970).

Constitution. Some of those contentions are explicitly based on the Sixteenth Amendment or other provisions of the Constitution. But the asserted "belief" that wages are not income also is at bottom a constitutional objection, because it is based on the notion that wages received for labor are paid in an equal exchange for the labor, which results in no gain or profit and which the Constitution therefore does not permit to be subjected to a direct tax. See *United States* v. *Mueller*, 778 F.2d 539, 541 (9th Cir. 1985); *United States* v. *Moore*, 692 F.2d 95, 97 (10th Cir. 1982); *United States* v. *Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980), cert. denied, 451 U.S. 942 (1981). That was the substance of petitioner's defense on the "wages as income" issue at trial. See Tr. 1212-1237, 1273, 1305, 1329-1331, 1360.

The courts have uniformly held that a belief that the Internal Revenue Code is unconstitutional does not negate the element of willfulness in a prosecution arising under the Code, and they accordingly have sustained instructions to that effect.[24] As the Fifth Circuit explained in *United States* v. *Burton*, 737 F.2d 439, 442 (1984):

> Those who believe, even in good faith, that the income tax law is unconstitutional are * * * willful violators if they understand the obligations the statute purports to impose on them. One who believes

[24] See *United States* v. *Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983); *United States* v. *Burton*, 737 F.2d 439, 442 (5th Cir. 1984); *United States* v. *Sassak*, 881 F.2d 276, 281 (6th Cir. 1989); *United States* v. *Grumka*, 728 F.2d 794, 797 (6th Cir. 1984); *United States* v. *Bressler*, 772 F.2d 287, 291 n.2 (7th Cir.), cert. denied, 474 U.S. 1082 (1985); *United States* v. *Miller*, 634 F.2d at 1135; *Haywood* v. *Day*, 619 F.2d 716, 717 (8th Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Ness*, 652 F.2d 890, 893 (9th Cir.), cert. denied, 454 U.S. 1126 (1981); *United States* v. *Mueller*, 778 F.2d at 541; *United States* v. *Hairston*, 819 F.2d 971, 973 n.3 (10th Cir. 1987). The district court's instruction in this case—that a good faith belief that the tax laws are unconstitutional is not objectively reasonable as a matter of law—was the functional equivalent of the instruction approved by the other courts of appeals.

> a statute to be unconstitutional is entitled to challenge it in court, *see* 26 U.S.C. § 7422,[25] but disobeys it only at the risk of criminal penalties should the constitutionality of the statute be upheld. The defendant's good faith belief that the statute is unconstitutional does not negate the willfulness of his defiance of the statute, * * *.

In other words, "it is not the prerogative of the taxpayer to make a personalized finding of unconstitutionality." *United States* v. *Payne*, 800 F.2d 227, 228 (10th Cir. 1986).[26]

This conclusion regarding the scope of a constitutionally based defense is deeply rooted in the Nation's jurisprudence. The principle was applied, for example, in *Reynolds* v. *United States*, 98 U.S. 145 (1878), in which the Court rejected a First Amendment challenge to a law prohibiting polygamy as applied to persons whose religious beliefs commanded that practice. The Court found it sufficient to sustain the conviction that "[e]very act necessary to constitute the crime was knowingly done,

[25] Under 26 U.S.C. 7422, a person may pay the tax and then challenge its constitutionality in a suit for a refund. See, *e.g.*, *United States* v. *Lee*, 455 U.S. 252, 254-255 (1982); *United States* v. *Ptasynski*, 462 U.S. 74, 79 (1983). This alternative means of relief avoids the risk of criminal penalties for non-compliance with the law. The same alternative of course is also available to a person who wants to challenge assessment of a tax on non-constitutional grounds, without the risk of criminal prosecution. Petitioner did not pursue that course. He did file other civil actions seeking an adjudication of his legal arguments, but he then continued to defy the law even after his arguments were rejected as frivolous.

[26] This unanimous view of the courts of appeals is consistent with the statutory text. The provisions under which petitioner was convicted, 26 U.S.C. 7201 and 7203, impose criminal penalties on one who willfully attempts to evade or defeat a tax "imposed by this title" or to file a return "required by this title." There is no suggestion that an individual is excused from liability based on his belief that Title 26 of the United States Code is unconstitutional in whole or in part.

and the crime was therefore knowingly committed." *Id.* at 167. The Court observed that the defense in the case was the defendant's "belief that the law ought not to have been enacted," but concluded that "[i]t matters not that his belief was part of his professed religion: it was still belief, and belief only." *Ibid.* Similarly here, petitioner's belief that the Internal Revenue Code should not have been enacted, and that it therefore could not constitutionally be applied to the compensation he received from American Airlines, does not defeat the showing of willfulness if, as the jury found, he was aware of the requirements of the Code.

Even if petitioner's asserted belief that wages are not income purported to rest on an interpretation of the Code rather than the Constitution, the analysis would be the same. Such a belief would be based not on lack of awareness of the duty imposed by the Code to pay taxes on income or to file returns, but on a fundamental challenge to the jurisdictional reach of the Code that is almost universally understood and respected by millions of other wage earners annually. As in the case of constitutional objections to the applicability of the Tax Code, there is no reason to recognize a defense of mistake of law where, as here, the defendant was aware of the requirements of the Code as construed by the courts but refused to submit to its jurisdiction.

E. Petitioner's Submission Also Is Inconsistent With General Principles of *Mens Rea* Under The Criminal Laws

This Court's decision in *Reynolds* v. *United States* is instructive here for an additional reason. It illuminates a basic analytical flaw in petitioner's repeated contention (Br. 21, 23, 25, 27-28, 30-35) that he had a subjective "belief" that he did not have to pay taxes. Petitioner's use of the term "belief" refers to something quite different from the "intent" or *mens rea* ordinarily required for the commission of a crime.

The various levels of culpability under the criminal laws are based on the actor's mental state in relation to such external factors as the nature of the forbidden conduct, the attendant circumstances, and the result of the conduct. See *Model Penal Code* § 2.02, Comment 1, at 229 (Official Draft and Revised Comments 1985). Under the *Model Penal Code*, for example, the actor's culpability turns on whether he acted purposely, knowingly, recklessly, or negligently. § 2.02(2). See *Liparota* v. *United States*, 471 U.S. 419, 424 n.5 (1985); *United States* v. *Bailey*, 444 U.S. 394, 404 (1980); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 (1978). Within this framework, a person acts "knowingly" with respect to a material element of the offense if he is "aware" that his conduct is of a particular nature, that the relevant circumstances exist, or that his conduct is practically certain to cause the specified result. *Model Penal Code* § 2.02(1). See *United States* v. *Bailey*, 444 U.S. at 404. In other words, knowledge is a matter of *cognition*. Thus, insofar as petitioner contends that knowledge of a legal duty is required for conviction under 26 U.S.C. 7201 and 7203, that requirement is satisfied where it is shown, as it plainly was here, that the defendant was aware of the Internal Revenue Code and the duties it imposed on him.

By contrast, the term "belief" often refers to matters of personal faith and conviction. A "belief" in this sense does not excuse a person from complying with the criminal law. The Court so held in *Reynolds*, explaining, 98 U.S. at 166-167, in language recently quoted in *Employment Division, Department of Human Resources* v. *Smith*, No. 88-1213 (Apr. 17, 1990), slip op. 6:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief su-

perior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Although petitioner does not base his opposition to the tax laws on religious grounds, he appears to use the term "belief" to mean an individual's conviction as to what is "true" rather than the mental state of knowledge of relevant circumstances—here, the existence of legal duties—that traditionally is relevant for mens rea purposes. Thus, he insists that the courts must respect a tax protester's "sincerely" held beliefs (Br. 21, 27, 32), that "[t]his Court must be especially vigilant to ensure that people who espouse annoying and controversial beliefs, as defenses to a criminal charge, are treated no differently than those whose beliefs are more traditional" (Br. 28), that a court should not focus on the "content of a belief" or "opinions" (Br. 30, 33, 43), and that the Seventh Circuit has entered a dangerous First Amendment thicket by abandoning "neutrality toward the beliefs of tax protesters" and announcing that those beliefs are "impermissible" (Br. 41-42).

It is clear, however, that petitioner was not punished for his subjective "beliefs" about the tax laws; he was punished because of his deliberate refusal to comply with those laws. Even if petitioner's motive for his actions was the assortment of subjective "beliefs" he espouses, his beliefs in the soundness or justness of his conduct or his theories of the law do not negate the element of mens rea where, as here, those beliefs have no plausible basis in the law as generally understood and applied, and the jury found that he knew what the law required of him but intentionally refused to comply. See J. Hall, *General Principles of Criminal Law* 99-100 (2d ed. 1960) (distinguishing motive from *mens rea* and explaining why motive is not an element of the offense). Compare *United States* v. *Pomponio*, 429 U.S. at 12 (no showing of evil "motive" required, beyond proof of intentional

violation of known legal duty); *United States* v. *Mueller*, 778 F.2d at 541 (belief that wages not income under the Constitution was merely the motive for failing to do what the law required).

The instant case presents a striking example of the mischief that the purely subjective test can cause. Petitioner was repeatedly warned in court proceedings to which he was a party that courts had consistently rejected his theories for escaping taxation. During cross-examination at trial, he admitted that he was aware that the decision in *United States* v. *Koliboski*, 732 F.2d 1328, 1329 n.1 (7th Cir. 1984), had stated in capital letters that wages are income. Tr. 1332-1333. He was sufficiently familiar with the case to know that the statement appeared in a footnote. Tr. 1332. Confronted with *Koliboski*, petitioner conceded, "Wages are income for a taxpayer," but then claimed he is not a taxpayer. Tr. 1333. Petitioner also grudgingly admitted that judges in the cases in which he had been a party had issued opinions or made statements telling him that wages are income, Tr. 1334-1336, but claimed that he simply did not believe those judges. Tr. 1368-1369. Petitioner further acknowledged that he had heard the judge give instructions in a friend's trial, but he denied that he learned what the law was. Instead, he said, "I learned what Judge Carroll considered the law to be," and he rejected that position. Tr. 1367-1368. Finally, petitioner acknowledged familiarity with this Court's decision in *Lucas* v. *Earl*, 281 U.S. 111 (1930), in which the Court held that an individual's salary and fees were income subject to tax. Tr. 1406.

It is difficult to imagine a case in which a defendant could be more fully informed about the judicial rejection of the grounds he gave for refusing to conform his conduct to the requirements of the law. Yet, even on these facts, some jurors were reluctant to convict petitioner. Petitioner contends (Pet. 19) that the questions from the jurors during their deliberations and the notes the jury

tendered to the court upon returning the verdict "show that at least some jurors were convinced that petitioner sincerely held his beliefs." In fact, however, the sympathy expressed by the jurors reveals one of the main weaknesses of the purely subjective test for willfulness: it rewards sincerity of belief even when the defendant knows that the belief has been rejected as legally unsound. If sincerity of belief becomes the test, persons like petitioner and his tax protest partners will be the ultimate judges of the requirements of the law, a step that will doubtless encourage others to take chances on violating the law in reliance on repudiated theories.

II. THE REQUIREMENT THAT PETITIONER'S BELIEF AS TO THE LAWFULNESS OF HIS CONDUCT BE OBJECTIVELY REASONABLE DOES NOT VIOLATE HIS CONSTITUTIONAL RIGHTS

Petitioner contends (Br. 36-43) that to define willfulness as containing an objective element in the circumstances of this case would violate the Constitution in three respects: it would apply a change in the law retroactively to him, in violation of principles of fundamental fairness; it would improperly eliminate the requirement of intent in criminal tax statutes; and it would deprive him of his right to have his guilt or innocence determined by a jury.

A. Petitioner Was Not Denied Due Process By A Change In The Law After The Time Of The Conduct Charged In The Indictment

Relying on *Marks* v. *United States*, 430 U.S. 188 (1977), petitioner argues (Br. 36-37) that because the Seventh Circuit adopted an objective test for willfulness in criminal tax prosecutions after the date of the conduct for which he was convicted, applying the rule to him offends fundamental notions of fairness. Petitioner, however, did not raise this contention in the court of appeals or in his petition for a writ of certiorari, and it is

therefore not properly before the Court. In any event, it is without merit.

As early as the decision in *Murdock*, this Court indicated that a mistake-of-law defense must be based on an objectively reasonable belief. The Court has never repudiated that suggestion. Thus, *Murdock* served notice that a good faith belief must be objectively reasonable. Moreover, as petitioner concedes (Br. 23), the Seventh Circuit stated as early as *United States* v. *Moore*, 627 F.2d 830, 833 (1980), cert. denied, 450 U.S. 916 (1981), that a mistake of law must be "objectively reasonable" under the criminal tax laws. That was sufficient to make application of that rule to petitioner reasonably foreseeable. See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984). Nor is application of that principle to petitioner's case unfair, because petitioner's knowledge of the requirements of the tax laws is established by the fact that he paid taxes and filed returns for ten years before the conduct at issue here, and it is undisputed that petitioner was advised that his beliefs had been rejected by the courts. See *United States* v. *Grumka*, 728 F.2d at 797 ("Grumka's assertion on appeal that he believed in good faith that he was under no legal obligation to pay federal income taxes is at odds with his admission at trial that he knew the Internal Revenue Service had not accepted and the Courts of the United States had not recognized his various rationales for refusing to pay income taxes."). Furthermore, petitioner's various arguments in this case boil down to the claim that the Internal Revenue Code, as applied to him, violates the Constitution. The courts of appeals have unanimously held that such a belief does not negate the element of willfulness. Because that principle goes back at least as far as *Reynolds* v. *United States*, more than 100 years ago, petitioner can scarcely claim unfair surprise in being denied that defense now.

B. The Jury Instruction In This Case Did Not Eliminate The Requirement Of Intent From The Criminal Tax Statutes And Did Not Violate Petitioner's Right To Have His Guilt Or Innocence Determined By A Jury

Petitioner asserts that the district court's instructions violated the Fifth Amendment by eliminating the *mens rea* requirement for criminal tax statutes (Br. 38-39), and violated the Sixth Amendment by depriving petitioner of the right to have a jury decide the issue of guilt or innocence (Br. 40-42).

The jury instructions in this case did not eliminate the *mens rea* element from tax crimes. To the contrary, they defined willfulness to require a finding of an intentional violation of a known legal duty. The instructions to which petitioner objects simply construed the criminal tax statutes as placing limits on the mistakes-of-law defense. Nothing in *Morissette* v. *United States*, 342 U.S. 246 (1952), on which petitioner relies, precludes that construction. In *Morissette*, the defendant, who had taken bomb casings he had found on government property, was charged with conversion under 18 U.S.C. 641. At trial, he sought to raise a mistake-of-fact defense—that he believed the casings were abandoned—but the trial court refused to permit the defense. This Court reversed the conviction, holding, as a matter of statutory construction, that criminal intent is an essential element of an offense under 18 U.S.C. 641. The Court did not suggest that an element of knowledge or intent was *constitutionally* required with respect to the question of abandonment in that case, see 342 U.S. at 254 n.14, much less with respect to the existence of legal duties that are as broadly applicable and widely known as the requirements under the Internal Revenue Code at issue in this case—to file returns and pay taxes on wages. Compare *Lambert* v. *California*, 355 U.S. 225 (1957). Nor did the Court in *Morissette* hold, even as a matter of statutory construction, that the defendant was entitled

to present a mistake-of-law defense. Indeed, in describing what would constitute a "knowing conversion" under the statute, the Court stated: "He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." 342 U.S. at 270-271. Thus, *Morissette* is fully consistent with a limitation of objective reasonableness on the availability of a mistake-of-law defense under the criminal tax statutes.

It also was proper for the district court and court of appeals to hold that certain beliefs are not objectively reasonable for purposes of the mistake-of-law defense. A court may clearly decline to submit to the jury a defense based on a belief that the tax laws are unconstitutional—the substance of petitioner's defense in this case—since, as a matter of law, such a belief does not negate the element of willfulness. Compare *Sansone* v. *United States*, 380 U.S. at 347. In arguing that the district court's instruction regarding the unreasonableness of certain beliefs erected an irrebuttable presumption that violated the Due Process Clause, petitioner relies (Br. 37, 41) on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In *Sandstrom*, however, the Court expressly distinguished *Reynolds* v. *United States* on the ground that the defendant's constitutionally based religious objection to the polygamy laws was not a defense. See 442 U.S. at 520 n.9. The district court therefore did not commit reversible error in this case by declining to submit the reasonableness of petitioner's constitutional views to the jury.

Even if petitioner's belief that wages are not income was based on the Internal Revenue Code rather than the Constitution, the district court was still correct in instructing the jury that that belief was not objectively reasonable. The questions of fact for the jury to decide in a case such as this are whether the defendant knew of his statutory duties, whether he actually held a particular belief with respect to his legal duties, and whether he held that belief in good faith. But the question whether

a particular belief about the requirements of the law is objectively reasonable is a question of law for the court to decide; objective reasonableness is not a factual issue as to which different juries should be permitted to reach different conclusions. Compare *Sinclair* v. *United States*, 279 U.S. 263, 298-299 (1929) (materiality of false statement question of law for court); *Kungys* v. *United States*, 108 S.Ct. 1537, 1547 (1988) (same).

Finally, even if the issue of objective reasonableness is considered a factual issue for the jury, it was not necessary to submit the issue to the jury in this case because there was no basis on which any factfinder could conclude that petitioner's views were objectively reasonable. Petitioner's asserted belief that his compensation from American Airlines is not income for purposes of the Internal Revenue Code flies in the face of the statutory definition of income to include "[c]ompensation for services." 26 U.S.C. 61(a). Petitioner has pointed to no judicial or other authority suggesting that this definition means something other than what it says. And petitioner's view that wages are not income has been rejected as frivolous by numerous courts. A court is not required to instruct a jury on a particular legal theory of the defense in the absence of any concrete basis in the evidence or applicable law for that theory. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988); *United States* v. *Bailey*, 444 U.S. at 415; *Battle* v. *United States*, 209 U.S. 36, 38 (1908); *Sparf & Hansen* v. *United States*, 156 U.S. 51, 63-64 (1895). That is the case here, because the record and petitioner's unsubstantiated and bizarre belief that wages are not income fall far short of furnishing a sufficient basis "for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. at 63.[27]

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[27] Petitioner also argues (Br. 41-43) that the jury instructions in this case violated the First Amendment because they amounted to a content-based regulation of "beliefs." Petitioner did not raise this issue in the court of appeals, and he made only a passing reference to it in his certiorari petition. Pet. i. In any event, this claim is meritless. As explained above (see pages 36-37, *supra*), petitioner was not punished for his "beliefs," but for his intentional violation of known legal duties under the tax laws. He is not exempted from criminal liability on the ground that his conduct might have been motivated by beliefs the expression of which would be protected by the First Amendment. See *Reynolds* v. *United States*, 98 U.S. at 166-167.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner, a tax protestor, convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that many of petitioner's beliefs are deemed "objectively unreasonable as a matter of law." The result is that petitioner – despite the sincere good faith on which he based his defense – can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique approach, under which petitioner was convicted and jailed because a panel announced that his sincerely-held beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which Petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

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JOHN L. CHEEK,

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THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

REPLY STATEMENT OF THE CASE

The Government's recitation of trial facts seems designed to propagate two erroneous impressions. First, the emphasis only on selected facts sounds the Government's theme that its evidence of willfulness at trial was overwhelming, and that Cheek's "misunderstanding of his duty to file" defense was wholly frivolous. If this were so, however, then the Government would surely not have needed the helping hand of *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), and *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989), to gain this conviction.

As recited in our Brief's Statement of the Case, the genesis and development of Cheek's asserted misunderstanding of the law (as the Seventh Circuit calls it – "belief") were based on various sources, including attorney letters, seminars, and manuals. After the supplemental jury instructions, most of this became irrelevant, of course, because Cheek's misunderstanding had been placed on the Seventh Circuit's forbidden list. However, it cannot fairly be said that Cheek's defense was anywhere near frivolous. And both the trial court and the jury indicated that the fact issues were close ones (*Petitioner's Br.*, pp. 9-13).

Buckner-Cheek helps the Government gain criminal convictions precisely in those situations where such help is least appropriate: the close cases.

Second, and related to the first observation, the Government's recitation of trial facts overstates the relevance and weight to be given the various judicial rulings to which Cheek was a party (*Gov't Br.*, pp. 3-5). Each of the cited judicial rulings was admitted at trial against the *pro se* Cheek, even though *none* of them could possibly be relevant to willfulness on each count of the indictment. For example, the Government cites as evidence of Cheek's obdurate refusal to acknowledge the law the Seventh Circuit's decision in *Cheek v. Doe*, 828 F.2d 395 (7th Cir. 1987), *cert. denied*, 484 U.S. 955 (1987). (*Gov't Br.*, p. 5). However, that decision was issued on June 5, 1987, *after* the latest date of any alleged offense in Cheek's indictment. It is clearly not relevant to Cheek's knowledge or lack thereof on the prior dates of the alleged offenses. The Government also recites evidence of two judicial rulings against Cheek which occurred in March of 1984 (*Gov't Br.*, p. 4). These March 1984 events could not possibly be relevant to Cheek's willfulness on Counts One, Two, Three, Four, and Five of the indictment, because those offenses allegedly were committed prior to March 1984. (See *Jt.App.* 5-15). Thus, the admissibility of these rulings at a trial of all ten counts can be seriously

questioned (an evidentiary issue concededly not before this Court). However, these judicial decisions must be given zero weight in assessing Cheek's willfulness (or lack thereof) on the main counts of the Government's indictment.[1]

Of course, the central thrust of our position is that Cheek was entitled to have a jury decide whether he acted with criminal intent. Thus, the weight or the strength of the Government's case at trial is now largely irrelevant. It does not assist this Court or the Government's position, however, for the Government to overstate the strength of its trial evidence.

It is sufficient to note that Cheek's criminal intent was hotly contested at trial and that his defense was hardly frivolous under any sufficiency standard.

REPLY ARGUMENT

I. Statutory Construction

The Government's argument wholly misconstrues Cheek's position. Cheek's defense was a traditional *Murdock*[2] defense to willfulness: that he harbored a *bona fide* misunderstanding of his duty to file and pay income taxes. The Government twice mischaracterizes this position.

The Government first says that Cheek argues that a person is not guilty of violating the tax laws when the person is aware of his duty under the Code, but does not subjectively believe in that view of the law (*Gov't Br.*, pp. 12-13, 21). This is not Cheek's position. This formulation smacks of mere disagreement with known law. Such a

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[1] The Government's facts omit any recitation of the contrary advice Cheek was given by the "tax protesters," which included judicial opinions (doubtless misinterpreted for Cheek).

[2] *United States v. Murdock*, 290 U.S. 389 (1933).

disagreement with known law is not a defense, as the *Cheek* jury was instructed (*Jt.App.* 75). Second, the Government argues that Cheek knew of his duties under the Code, but believed that there was some legal ground that excused him from having to comply with these requirements (*Gov't Br.*, pp. 12, 18). The Government, after making this equally erroneous formulation of Cheek's defense, has the further temerity to assert that *Buckner-Cheek* "afforded petitioner added protection" (*Gov't Br.*, pp. 12, 18), and to characterize Cheek's resistance to *Buckner-Cheek* as the urging of an "extension" of the *Murdock* defense (*Gov't Br.*, p. 13).

For the Government to thus claim that *Buckner-Cheek* represents settled law, and that Cheek is urging some departure from settled law, is to stand history and precedent on its ear. It is most certainly disingenuous for the Government to tell this Court that the doctrine it is urging to become the law of the land is one which will afford tax protesters added protection!

The observation deserves to be repeated: In faulting Cheek for failing to appreciate "that the [*Buckner-Cheek*] instruction added to, rather than detract[ed] from, [his] protections" (*Gov't Br.*, p. 18), the Government makes the unwarranted and erroneous factual assertion that Cheek knew his legal duty in the *Bishop*[3] and *Pomponio*[4] sense (*Gov't Br.*, pp. 12, 16-17). The Government further states that Cheek's defense was that while he knew his legal duties, he in good faith believed that there was some legal ground that excused him from performing those duties. This, of course, was never Cheek's defense. Again, Cheek's defense was that, per *Murdock*, he had a *bona fide* misunderstanding as to *his* duty to file and to pay taxes. The *Murdock* issue is *Cheek's* understanding of *Cheek's* duty to file. Indeed, if the Government could prove

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[3] *United States v. Bishop*, 412 U.S. 346 (1973).

[4] *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976).

beyond a reasonable doubt that Cheek knew his legal duty (and intentionally violated it), then the Government would have its conviction, even under the subjective intent instructions prevailing everywhere but the Seventh Circuit.

The Government appears to have trouble with the use of the term "beliefs" in this context. The term "beliefs" is not ours, but is the term used by the Seventh Circuit. See *Cheek*, 882 F.2d at 1267-69. Apparently, the Seventh Circuit uses the term "belief" synonymous with the term "misunderstanding" from *Murdock*. Thus, the Government is wrong when it tells this Court that "petitioner appears to use the term 'belief' to refer to matters of personal faith and conviction . . . " (*Gov't Br.*, p. 14).

Petitioner does agree with the Government's starting point that this Court has defined "willfully" in the tax context simply as "a voluntary intentional violation of a *known* legal duty." (*Gov't Br.*, p. 21). *Murdock* and its progeny also make it clear that it is a defense to "*knowing*" one's legal duty if one has a "*bona fide* misunderstanding" of his duty to file a return and pay a tax. *Murdock, supra*, at 396. These instructions, taken from this Court's cases, define what has come to be known as the subjective standard for the mistake of law defense in tax cases. No additional jury instructions should be necessary. Contrary to the Government's argument that the Seventh Circuit is trying to help the beleaguered tax protesters, *Buckner-Cheek* imposes an additional standard on this defense, namely that of objective reasonableness of the *substance* of a proffered belief or misunderstanding. As we stated in our Brief, *Buckner-Cheek* ignores any consideration being given to the *genesis* or *basis* of the belief or misunderstanding, and focuses solely on its substance. This strange new requirement is flatly inconsistent with *Murdock*, *Bishop*, and *Pomponio*.

The Government further strains credulity by posing *Murdock* as this Court's seminal decision which supports the Government's position. *Murdock* nowhere stands for

the proposition that the willfulness determination can be taken from the jury, as the second prong of *Buckner-Cheek*, the "pre-emptive strike" prong, does. The Government ignores the central holding of *Murdock*, in which this Court makes clear that Congress did not intend that a person by reason of a *"bona fide* misunderstanding . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *Murdock, supra*, at 396. The Government now urges upon this Court the very result which this Court condemned in 1933. The Government's Brief (p. 23) quotes various willfulness formulations which *Murdock* used to exemplify definitions found in various statutes. *Murdock's* willfulness formulation nowhere suggests that the rule of objective reasonableness properly limits the defense, as argued by the Government. (*Gov't Br.*, p. 23). The Government suggests that, based on *Murdock's* sample formulations of willfulness, "the defendant's subjective belief must have at least some concrete basis in extrinsic circumstances." (*Gov't Br.*, p. 24). While this observation was not a part of *Murdock's* holding, we agree with it. Any defense offered by any defendant in any criminal case must have some "concrete basis in extrinsic circumstances" before the defendant is entitled to a jury instruction on the defense. In this case, of course, there is substantial evidence of the "basis in extrinsic circumstances" for Cheek's asserted beliefs or misunderstandings: his attendance at seminars and lectures, some of them given by lawyers. The Government's reliance on *Murdock* is ephemeral. *Murdock* supports Cheek's position.[5] Jury instructions based on

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[5] After surveying the various willfulness definitions from other statutes, *Murdock* (290 U.S. at 393) held that under the tax laws it was error for the trial court to have denied this jury instruction:

> "If you believe that the reasons stated by the defendant in his refusal to answer questions were

(Continued on following page)

Murdock, Bishop, and *Pomponio* would be more than adequate to protect the statutory and constitutional interests of both the Government and tax protester defendants. *Murdock* stands for the proposition that it is up to the jury to determine whether a tax defendant's conduct is willful.

The Government relegates to footnote 7 of its Brief (p. 8) the erroneous suggestion that petitioner "does not appear to challenge" his conviction on the false-claim-for-tax-refund count (Count V – 18 U.S.C. 287; *Jt.App.* 10). This is patently specious. As the Court of Appeals below noted, "all of the crimes of which Cheek was convicted require willfulness." *Cheek*, 882 F.2d at 1267. The Seventh Circuit then applied its *Buckner* analysis to all of the charges, including Count V. *Id.* at 1267-68. Likewise, the trial court's theory of defense instruction, as well as its supplemental instruction, apply *Buckner* to all of the charges in the indictment. (*Jt.App.* 80-81; 87-88). Especially when Section 287 is applied, as here, to a claim for an income tax refund, the analysis of *Buckner's* fatal defects under the Title 26 charges is fully applicable to it as well. The Government thus unintentionally does point out yet another error in Cheek's trial: the failure to expressly tell the jury that willfulness was an element of Count V. (*Jt.App.* 78-79). In any event, *all* of the counts on which Cheek was convicted stand or fall based on the validity of the *Buckner-Cheek* doctrine.

The Government even claims to find a friendly haven in *Bishop*. (*Gov't Br.*, pp. 26-27). *Bishop* expressly rejected a Ninth Circuit holding that there could be a tax conviction upon a showing of "unreasonable, capricious, or careless disregard for the truth." In *Bishop* this Court stated, "Degrees of negligence give rise in the tax system to civil

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(Continued from previous page)

> given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was willful."

penalties." *Id.* at 361. Yet the Government wants this Court to impose a reasonableness or negligence standard, as if such had been the law all along.

The Government even argues with us as to the line-up of the Circuits. (See *Gov't Br.*, p. 19, n.11). It was the Seventh Circuit itself in *Cheek* that acknowledged that the *Buckner-Cheek* doctrine was contrary to these seven Circuits which have considered the question – the First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. Apparently the Government takes issue with the Seventh Circuit's inclusion of the Second, Fourth, and Sixth Circuits in this list. As to the Second Circuit, the Government cites *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987). In *Schiff*, the subjectively reasonable instruction was given by the district court and the Second Circuit's statement in *Schiff* was clear *dictum*. Clearly, as the Seventh Circuit recognized, in both the Fourth and the Sixth Circuits no "objectively reasonable" requirement has ever been imposed. Those Circuits, indeed, have never squarely been faced with the objectively reasonable requirement, because apparently the Government has not had the temerity to urge it upon those Circuits in tax protester cases. We did not in our Brief, as the Government erroneously contends, state that the jury instructions approved by the Seventh Circuit would be rejected by ten other Courts of Appeals. Rather, we indicated that in those ten Circuits no "objectively reasonable" requirement has ever been imposed. As apparently even the Government does concede, the First, Fifth, and Tenth Circuits have expressly rejected the objectively reasonable requirement. Whether one looks at our count of the Circuits, the Seventh Circuit's count of the Circuits, or the Government's count of the Circuits, it is clear that the *Buckner-Cheek* doctrine is unique to the Seventh Circuit; and even the Circuits that both sides want to count, such as the Fourth, Sixth, and Ninth, have never imposed it.

Next, the Government argues that the *Buckner-Cheek* doctrine is supported by the policies of the tax laws. (*Gov't Br.*, 27-29). In *Bishop*, of course, this Court made clear that it was the intent of Congress to construct a range of penalties that distinguish the purposeful tax violator from the "well-meaning but easily confused" mass of taxpayers. And, indeed, the tax collection policies which Congress has enacted have made criminal prosecution only a part. Thus, even if criminal intent is lacking, the Government has myriad civil and administrative remedies to collect not only taxes owed but also substantial penalties and interest. Criminal prosecution is to be viewed as a last resort sanction, not as a vehicle to punish tax protesters whose views are annoying to the Government. *Sansone v. United States*, 380 U.S. 343, 350 (1965). The *Buckner-Cheek* doctrine will not, as the Government urges, separate the purposeful tax violator from the well-meaning but confused taxpayer. (*Gov't Br.*, pp. 14, 28). Under *Buckner-Cheek*, if petitioner were a confused taxpayer, he would be found guilty, because his particular confusion is on the forbidden list. Cheek is not, as the Government states, one "who is aware of the requirements of the tax laws . . . but seeks to exempt himself through reliance on some frivolous proposition. . . . " (*Gov't Br.*, p. 78). It should have been the Government's burden at trial to prove to the jury beyond a reasonable doubt that Cheek had such awareness. Stating that conclusion in a brief is not enough. In any event, Cheek is entitled to have a jury make the distinction and decide whether he acted with criminal intent or naive gullibility. We do agree that *Buckner-Cheek* would, as the Government urges, induce prompt and forthright fulfillment of every duty under the income tax law. (*Gov't Br.*, p. 28). It would do so, however, by making income tax felonies virtually strict liability offenses. Both Congress and the Constitution, however, stand in the way of such a result.

The Government states, as if it were an established fact (*Gov't Br.*, p. 29), that Cheek is an individual who has

clung to a theory despite his awareness of judicial decisions firmly rejecting his theory, and that Cheek therefore knows his duty, even if he refuses to believe that the courts are correct. This, again, was not Cheek's defense. It was the Government's theory at trial. And it should be the jury's prerogative to accept or reject the respective theories, not the Government's. The Government, as does *Buckner-Cheek*, thus shows a disrespect for the ability and the right of juries to make the willfulness determination.

Lastly in this regard, the Government makes no suggestion or showing that the policies behind our nation's tax laws have been frustrated by the use of the subjective standard in the other Circuits.[6]

The Government does not deal at all with the many practical difficulties in applying *Buckner-Cheek*. (*Petitioner's Br.*, pp. 33-36). Under *Buckner-Cheek*, other anomalies exist. For example, a defendant who has failed to file tax returns could plead guilty by telling the Court: (a) that he did not file his tax returns, and (b) that he did so because he possessed a sincere but erroneous understanding or belief which is on the "forbidden list." He could plead guilty despite the fact that he lacked criminal intent, although he would be sentenced under applicable sentencing guidelines for what is defined as a willful offense. Surely, the Government cannot contend that such a result ought to be the law of the land.

The Government next argues that the "legal arguments" petitioner raised in his defense were, as the Court of Appeals held, not objectively reasonable. (*Gov't Br.*, pp. 29-30). Once again, the Government misapprehends the entire thrust of petitioner's argument. Petitioner did not

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[6] Indeed, in a more traditional tax shelter prosecution, the Government argued that "willfulness is a factual question of his subjective intent, not a legal question of the objective certainty in the law." *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987), *cert. dismissed*, 483 U.S. 1042 (1987). Now the Government wants this Court to treat tax protesters differently.

make *legal* arguments that, *e.g.*, wages were not income. Rather, petitioner made a *factual* argument at trial that at the time of the alleged offenses he honestly and in good faith believed what he was taught: that wages were not income. Whether, in fact, petitioner's belief or understanding in this regard was held sincerely and in good faith or was pretextual is a fact question for the trier of fact – in this case, the jury. Once again in its discussion, the Government totally ignores the relevance and materiality of the evidence as to the genesis of Cheek's erroneous beliefs.

There is no question but that the Government can cite legal authority indicating that Cheek's understandings were wrong as a matter of law. (*Gov't Br.*, pp. 30-31). And even if such arguments are, as a matter of civil law, deemed frivolous, that should not mean that the good faith holding of them can *never* be a defense. Once again, the Government mischaracterizes Cheek's defense when it states, "This is not a case in which petitioner claims he was unaware of his duties under the tax laws. His defense was that while he was aware of those duties, he did not believe that they could be properly imposed on him." (*Gov't Br.*, p. 31). Apparently, we need to repeat it so the Government can hear: Cheek's defense was that he had a *bona fide* misunderstanding as to *his* duty to file. *Murdock*, *Bishop*, and *Pomponio* give Cheek that defense; *Buckner* tries to take it away.

The Government, in a fitful attempt to redefine the battlefield in terms favorable to it, also tries to recharacterize Cheek's defense as "essentially beliefs that the tax laws violate the Constitution." (*Gov't Br.*, pp. 31-32). Again, this was not an aspect of Cheek's asserted understandings which were impacted by *Buckner-Cheek*. For example, Cheek's understanding that wages were not income is not a constitutional argument. It may seem an absurd view to lawyers for the Government and even to this Court, but it is not beyond the experience of the law that a person could sincerely, although erroneously,

believe it.[7] Indeed, at least some of the jurors and the trial court thought Cheek honestly, but foolishly, held such a belief. (*Petitioner's Br.*, pp. 11-13). Thus, this Court need not reach the question of whether a good faith understanding that a tax law is unconstitutional can be a defense; the issue simply is not present in this case and is not before the Court. One could certainly argue, however, that a person who contends that he believed a law to be unconstitutional is acknowledging that he knows what the law is.

The Government next claims that Cheek's position is inconsistent with general principles of *mens rea* under the criminal laws.[8] (*Gov't Br.*, pp. 34-38). Nothing could be more inaccurate. One of the cornerstone principles of *mens rea* under the criminal law in this country is the right of a defendant to have a jury decide whether it exists. The Government obviously believes that juries will stand in the way of its effective rounding-up of annoying tax protesters. This is both a dangerous notion and is insulting to the faith that the Government should have in juries. It is a fear not borne out in the other Circuits. Once again, the Government tries to redefine the term "belief" to mean a matter of personal faith and conviction. (*Gov't Br.*, p. 35). That, of course, is not the relevant meaning of the term "belief." As we stated earlier, the term "belief" is the term used by the Seventh Circuit. It is not our term. The Seventh Circuit uses the term "belief" interchangeably with the term "misunderstanding" as used in

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[7] Cheek was indoctrinated, *inter alia*, that the wages of a privately-employed person represent an even exchange of his labor for money, and thus no gain is realized. (*Jt.App.* 48, 55, 57).

[8] The Government acknowledges that criminal culpability is based on the actor's mental state, in relation to external factors. (*Gov't Br.*, p. 35). But *Buckner-Cheek* violates this notion, because it excludes external factors, such as the genesis or basis for a defendant's understanding.

Murdock. We are in no way suggesting that Cheek or anyone else is immune from criminal prosecution if he knows what the law is, but believes it should be otherwise, and therefore violates it.

The Government, in this section of its Brief, reveals a palpable frustration over the jury's hesitation in convicting Cheek, even with the helping hand of the *Buckner* instruction.[9] (*Gov't Br.*, p. 37). This impatience underscores the need to have juries make such determinations. The subjective test – which has been adopted by numerous Circuits, apparently without difficulty – does not, as the Government claims, "reward sincerity of belief, even when the defendant knows that the belief has been rejected as legally unsound." (*Gov't Br.*, p. 38). The instructions, mandated by *Murdock*, *Bishop*, and *Pomponio* and applied by the other Circuits in this country, adequately protect both the defendant's constitutional rights and the Government's legitimate concerns. *Buckner-Cheek* caters to the Government's illegitimate concerns.

II. Constitutional Issues

Even were the Government convincing in overturning over 40 years of this Court's statutory construction, the Constitution of the United States would pose a barrier. The most obvious constitutional failing of the *Buckner-Cheek* doctrine is its retroactivity and its related unforeseeable, but inevitable, expansion of its list of forbidden beliefs. In response to this argument, the Government makes two statements. First, it attempts to interpose the procedural objection that retroactivity was not raised in the Court of Appeals or in the *certiorari* petition, and it

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[9] It is doubtful that a jury of (presumably) taxpaying citizens ordinarily starts out with much sympathy for a defendant like Cheek. Any such defendant faces an uphill battle in convincing a jury of his *bona fides* – even under the subjective standard. The Government does not need the boost of *Buckner-Cheek*.

is not properly before the Court. Second, it makes the remarkable assertion that *Murdock* in 1933 and the Seventh Circuit's *dictum* in *Moore*[10] in 1980 put Cheek on notice that in his Circuit the "objectively reasonable" requirement prevailed under the criminal tax laws. In making this latter argument, the Government misinterprets *Murdock* and ignores entirely *United States v. Dack*, 747 F.2d 1172 (7th Cir. 1984), in which the Seventh Circuit expressly held that the *subjectively reasonable* standard applies to tax protester cases.

As to the first point, petitioner, both in the Court of Appeals and in his petition for a writ of *certiorari*, squarely presented the question of the constitutionality of the *Buckner-Cheek* doctrine. Petitioner's appellate brief recognized that *Buckner* was the established law of the Seventh Circuit, and urged the Circuit to reverse itself. *See* Cheek's Brief on Appeal, pp. 31-32. In its opinion, the Seventh Circuit declined to abandon *Buckner*. Express and essential elements of *Buckner-Cheek* are, of course, its retroactivity and its ever-expanding list of forbidden beliefs. In the *certiorari* petition, likewise, Cheek squarely presented the question of whether the *Buckner-Cheek* doctrine is consistent with the Fifth Amendment. Thus, the issue is certainly before this Court.

Second, as stated in our Brief, *Marks v. United States*, 430 U.S. 188 (1977), by itself requires reversal of Cheek's conviction. *Buckner*, which was decided on October 1, 1987, was applied to offenses which were allegedly committed by Cheek between 1981 and April 1987, prior to the date of *Buckner*. Indeed, *Buckner* was decided after the superseding indictment of Cheek and just before Cheek's trial commenced. (*Jt.App.* 2). The Government claims that its unique (and, as discussed above, erroneous) reading of *Murdock* put Cheek on notice that the objectively reasonable standard was the law of the Seventh Circuit.

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[10] *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

(*Gov't Br.*, p. 39). The Government is less than forthright with this argument, because it wholly fails to remind this Court of the Seventh Circuit's 1984 holding in *United States v. Dack, supra*, in which the Seventh Circuit expressly held that the *subjectively reasonable* standard applies in tax protester cases. Thus, the Government's argument is that while Cheek was put on notice by *Murdock* of the "objectively reasonable" standard, the judges of the United States Court of Appeals missed such notice, and *Dack* was the result. While the Government clearly has little regard for Cheek's efforts as a legal researcher, it imposes on him a standard of prescience exceeding that of the judges of the Seventh Circuit who decided *Dack*. The fact remains that retroactivity is a fatal flaw in *Buckner-Cheek*. Cheek was tried for offenses which occurred before the unique "objectively reasonable" standard was applied, even in the Seventh Circuit. Indeed, Counts Eight, Nine, and Ten of Cheek's indictment should have been tried under *Dack's* standard; for that was the law of the Seventh Circuit on the dates of those alleged offenses. *Buckner-Cheek's* retroactivity is both unconscionable and unconstitutional, and this Court should not permit it.

The Government denies that there is any other Fifth Amendment problem with the Court of Appeals' "preemptive strike" prong of *Buckner-Cheek* that certain beliefs are not objectively reasonable, and can never provide a defense, no matter what the external circumstances. (*Gov't Br.*, pp. 40-42). The Government again argues that at trial Cheek contended that the tax laws are unconstitutional. But this is clearly not the issue before this Court. In the alternative, the Government argues that even if Cheek's belief that his wages were not income was based on the Internal Revenue Code, rather than the Constitution, the *Buckner-Cheek* doctrine is still correct. The Government says, "Objective reasonableness is not a factual issue as to which different juries should be permitted to reach different conclusions." (*Gov't Br.*, p. 42). This statement is incorrect and illustrates the difficulties

that the Fifth and Sixth Amendments pose for the *Buckner-Cheek* doctrine. The whole purpose of our jury system is to permit different juries to reach different conclusions based on different sets of facts presented by different defendants. For example, a defendant who claims to have come to understand that wages are not income because he saw it written in the sky one day may well be convicted by a jury. A defendant who claims to have come by his understanding that wages are not income because he went to seminars at which tax lawyers spoke, and because he read their pamphlets and received their opinion letters to that effect, may have an entirely different outcome before a jury. There simply are differences among defendants, both as to beliefs (or understandings) that they harbor and as to the bases for the beliefs that they harbor. *Buckner-Cheek* eliminates any individualized consideration by a jury of the willfulness or lack of willfulness of a particular defendant. That is a defect of constitutional dimension. See *Cabana v. Bullock*, 474 U.S. 376, 384 (1986); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *Morissette v. United States*, 342 U.S. 246 (1952).

The Government recognizes its dilemma by making one additional argument. The Government says (*Gov't Br.* p. 42) that "even if the issue of objective reasonableness is considered a factual issue for the jury, it was not necessary to submit the issue to the jury in this case, because there was no basis on which any fact finder could conclude that petitioner's views were objectively reasonable." And, indeed, the Government suggests that "in a close case" the question should be submitted to the jury. (*Gov't Br.*, p. 15). These observations apparently refer to the evidentiary requirement that a defense reach a certain sufficiency threshold before it can be argued and before the jury can be instructed about it. We have no quarrel with that long-standing rule of criminal law. However, the issue of whether Cheek's defense was sufficient to surpass that threshold is simply not before this Court. The trial court in the case at bar clearly found that

Cheek's defense surpassed that threshold. Indeed, he instructed the jury on it. (*Jt.App.* 80-81). A jury can be told that a defendant misunderstood the tax laws, that is, that the defendant's proffered belief is wrong as a matter of law. But even if objective reasonableness were a requirement, it would still be a jury question as to whether that defendant's holding of the misunderstanding is reasonable under *all* of the circumstances. The fact remains that a reasonable jury could have found that Cheek was indeed a gullible and misguided victim caught up in the tax protest movement.[11] And again, the Government makes no attempt to justify the fine factual distinction that it has drawn between petitioner Cheek, whose beliefs (in the Government's view) are bizarre and unreasonable, from Government witness Pacelli, whose beliefs were identical to Cheek's, but who was not deemed by the Government to have criminal intent. (*Petitioner's Br.*, pp. 32-33).

Clearly, the Government knows (or believes?) that the question of a defendant's criminal intent is for the jury to decide. A wholly frivolous defense by a tax protester, that is, a defense without any evidentiary support or evidentiary genesis, could always be precluded under the well-established principles of criminal law. Thus, *Buckner-Cheek* not only improperly imposes the "objectively reasonable" requirement, but also takes its determination away from the jury as to beliefs on its forbidden list.

Lastly, the Government makes light of Cheek's First Amendment arguments, relegating them to a footnote.

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[11] The Government incorrectly suggests (*Gov't Br.*, p. 17, n.9) that gullibility was not Cheek's defense in the court below. It certainly was part of his *pro se* defense that he had listened to what tax protester lawyers had told him, and that at the time he believed it. (*Jt.App.* 46-59).

(*Gov't Br.*, pp. 35-36, 42 n.27). We are not, in this argument, seeking to excuse Cheek or anyone else from criminal liability, simply because he may have a subjective belief in the justice or soundness of a cause. The entire *Buckner-Cheek* doctrine was expressly directed at a particularly annoying group of defendants – tax protesters – based on the content of their views.[12] That should be a First Amendment concern to this Court, even though we concede that the *Buckner* instruction itself does not punish the mere holding of beliefs. The doctrine is clearly not content neutral, however, for it burdens certain beliefs due to their content. And a belief (or understanding) which is reasonable today could be judicially declared to be unreasonable tomorrow, at the sole discretion of the Seventh Circuit.

The unsoundness and danger of *Buckner-Cheek* could not be clearer. And the Government nowhere in its Brief deals with the problem posed by the ever-expanding and unknowable list of forbidden beliefs. Indeed, the Seventh Circuit has done it again. Since our Brief was filed with this Court, the Seventh Circuit has decided *United States v. Dunkel*, 900 F.2d 105 (7th Cir. 1990), in which the list of forbidden beliefs has grown again. In affirming Dunkel's tax convictions, the Seventh Circuit expressed its surprise to discover that the district judge had allowed Dunkel's lawyer to present evidence and argue to the jury that Dunkel's belief that "taxes are voluntary" could be a defense to a criminal prosecution. Apparently, the district

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[12] Recently the Seventh Circuit, in reversing a more traditional tax defendant's conviction for skimming business receipts, condemned the jury instruction which was given on skimming by finding that the instruction amounted to a " . . . substitution of a formalistic test for the jury's evaluation of the facts." *United States v. Toushin*, 899 F.2d 617, 623 (7th Cir. 1990). Yet, as to tax protester defendants, the Seventh Circuit imposes the "formalistic test" of *Buckner-Cheek*, without apparent qualms.

judge in *Dunkel* recognized the pitfalls of applying *Buckner-Cheek* in its entirety, and chose to deviate from it. Observed the Seventh Circuit in *Dunkel*, "Like the Lord High Executioner in the *Mikado*, we've 'got a little list' of beliefs that are objectively unreasonable. . . . We add to that list the belief that payment of income taxes is 'voluntary.' "[13] *Dunkel*, 900 F.2d at 108. The offenses for which the jury convicted Dunkel allegedly occurred in 1981 and 1982. Yet, eight years later, and after his trial, the Seventh Circuit declared his beliefs unworthy of supporting a defense, even though the declaration was unnecessary to the affirmance of Dunkel's conviction. What beliefs or defenses or misunderstandings in the future will a federal judge declare cannot ever be objectively reasonable?

Buckner-Cheek is unfair. It is fraught with practical problems, and it is unnecessary. The Government does not need *Buckner-Cheek*. Like a quarterback fearing a sack, the Government has scrambled to try to justify it to this Court. The tax collection system has proceeded for years outside the Seventh Circuit with no perceived problems under the "subjectively reasonable" standard which has been a traditional standard for willfulness in this country for 200 years. To make *Buckner-Cheek* the law of the land would be to turn our back on this heritage.

It is easy for the Government to ridicule persons like Cheek who fall under the sway of the tax protester gurus. "Their views are ridiculous," the Government argues (to paraphrase), "therefore, let's not bother and confuse juries with them." But harboring ridiculous views is not criminal intent. And the core fact question – whether Cheek's understanding was sincere or pretextual – is the kind of issue that juries have an almost mystical ability to decide accurately.

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[13] Of course, in the *Mikado* the Lord High Executioner is a comic buffoon who at the end of the opera loses the fair young maiden. F. Moore, *Crowell's Handbook of Gilbert and Sullivan*, 69-76 (1962). A similar fate should befall *Buckner-Cheek*.

Buckner is unwise, unfair, and unnecessary. It not only imposes an "objectively reasonable" standard on criminal intent, but it also gives the courts power to declare, on an *ad hoc* basis, new forbidden beliefs which become "annoying," and bar them retroactively.

We have a commitment in our system of justice to trust and rely on the collective wisdom of twelve jurors to determine whether one of our citizens should be forever branded a criminal. Only this Court can remind the Government and the Seventh Circuit of this fact.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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June 18, 1990

No. 89-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER PRESENTING RECENT AUTHORITY

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QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner, a tax protestor, convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that many of petitioner's beliefs are deemed "objectively unreasonable as a matter of law." The result is that petitioner—despite the sincere good faith on which he based his defense—can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique approach, under which petitioner was convicted and jailed because a panel announced that his sincerely-held beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which Petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

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SUPPLEMENTAL BRIEF OF PETITIONER PRESENTING RECENT AUTHORITY

This case is set for oral argument on October 3, 1990.

Pursuant to Supreme Court Rule 25.5, petitioner respectfully presents for this Court's consideration the recently-decided opinion of the United States Court of Appeals for the Seventh Circuit, *United States of America v. Norby Walters*, ____ F.2d ____ (7th Cir. No. 89-2352, September 17, 1990) (included as the Appendix):

ARGUMENT

An issue before this Court in the instant case is the extent to which an income tax defendant is entitled to present to the jury a defense of "good faith" based on a mistake of law from advice from counsel. In "tax protester" cases, the Seventh Circuit in *Buckner* and *Cheek*[1] substantially curtailed the availability of such a good faith defense.

In *United States v. Walters*, *supra*, decided September 17, 1990, the Seventh Circuit reversed the defendants' convictions on conspiracy, racketeering, and fraud charges, holding that the asserted "mistake of law" good faith defense, based on advice of counsel, should have been submitted to the jury. Said the Seventh Circuit, "This Court has often stated, '[t]he defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by the law and which has some foundation in the evidence, however tenuous.' " (*Walters*, Slip Op., p. 5). The Seventh Circuit added, "Such questions must be resolved by the jury—not the court." (Slip Op., p. 6).

In the case at bar, "good faith" is also a complete defense. Part of Cheek's defense similarly was based on the advice he received from attorneys as to his tax responsibilities. Unlike *Walters*, *Buckner-Cheek* precluded the defense from being considered by the jury; indeed, *Buckner-Cheek* rendered the evidence on this defense irrelevant.

[1] *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987); and *United States v. Cheek*, 882 F.2d 1263 (7th Circuit 1989), *cert. granted* ___ U.S. ___, 110 S.Ct. 1108 (1990), together referred to as *Buckner-Cheek*.

In *Walters*, *supra*, the Seventh Circuit tacitly recognizes the unsuitability of *Buckner-Cheek*. Clearly, in *Buckner-Cheek*, the Seventh Circuit has singled out "tax protesters" for exceptionally harsh and unfair treatment; indeed, treatment which in *Walters* resulted in the convictions being reversed. *Buckner-Cheek* is an anomaly, even in the Seventh Circuit.

CONCLUSION

Petitioner John L. Cheek respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 89-2352, 89-2353, 89-3285, 89-3286

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NORBY WALTERS and LLOYD BLOOM,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 CR 709—**George M. Marovich,** *Judge.*

ARGUED MAY 8, 1990—DECIDED SEPTEMBER 17, 1990

Before BAUER, *Chief Judge*, MANION, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge.*

BAUER, *Chief Judge.* Norby Walters and Lloyd Bloom were sports agents who specialized in representing college football players. Walters and Bloom would recruit young players still in college and secretly sign them to exclusive representation contracts. The players would then lie about the existence of their contracts on the amateur athletic eligibility forms they submitted to their universities. The athletes would then continue to receive scholarships from these universities and play football on the schools' teams. Walters and Bloom were convicted on charges of mail

fraud, RICO violations and conspiracy for their participation in this scheme. They now appeal to this court, contending that several errors were committed during their trial that should render their convictions invalid. We believe that fundamental errors occurred at trial which prejudiced the defendants' ability to receive a fair trial. We, therefore, reverse and remand with instructions for a new trial.

I. BACKGROUND

Norby Walters, a former nightclub owner, and Lloyd Bloom, a 25-year-old, self-described salesman, together formed World Sports & Entertainment ("WS&E") in August 1984. In the past, Walters had represented entertainers such as the Jackson Five, Dionne Warwick and The New Edition. With their new enterprise, Bloom and Walters hoped to make the transition from managing musical entertainers to representing professional athletes.

Walters and Bloom would entice talented college football players to sign exclusive representation contracts with WS&E by providing signing bonuses in cash, no-interest loans, sports cars and other incentives. As it was in the interest of both the agents and their clients for the players to retain their college eligibility, the contracts were post-dated and the agreements were kept secret by both sides.

The National Collegiate Athletic Association ("NCAA") forbids players from signing with an agent or receiving compensation for athletics before the expiration of collegiate athletic eligibility. An athlete who violates these rules is considered to have waived his eligibility in return for payment, and can no longer compete in college athletics. Schools who are members of the NCAA require their players to submit forms testifying to the lack of such restrictions on their eligibility. The forms are then filed with the NCAA. Thus, the players who had signed agreements with Walters and Bloom would lie to their colleges on these eligibility forms in order to continue to receive scholarships and to play for their school teams.

Prior to beginning their enterprise, in January 1985, Walters and Bloom consulted with attorneys at the law firm of Shea & Gould in New York concerning the possible legal ramifications of these agreements. Lonn Trost, the head of the sports law department at Shea & Gould, informed the agents that while they were violating NCAA rules by signing athletes who then continued to play for their college teams, they were not violating any laws. Trost and other attorneys at Shea & Gould admit that they were aware that athletes would probably have to conceal this arrangement from their universities. They contend, however, that they were not aware that the athletes would lie openly on their NCAA eligibility forms.

Walters and Bloom were much more successful recruiters than agents or negotiators. In all, 58 college football players entered into representation agreements with WS&E. Only two players, however, continued the relationship after graduation from college. The vast majority felt cheated by Walters' and Bloom's clandestine tactics and signed with other agents prior to the NFL draft. Walters and Bloom again consulted with Shea & Gould to consider enforcement of the contracts. The agents were out not only their anticipated representation fees, but the loans they had made to the players up front. Their attorneys believed that the contracts were enforceable, but recommended against litigation. The government alleges, and several former clients testified, that Walters and Bloom personally threatened them in an attempt to enforce these contracts. One player, Maurice Douglas, was told his legs would be broken before the NFL draft if he did not repay his loan to WS&E.

On August 24, 1988, Walters and Bloom were charged in a seven-count indictment with mail fraud, RICO violations, and conspiracy in the Northern District of Illinois.[1]

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[1] A superseding indictment was filed February 1, 1989, making several changes to the content of the counts. None of the changes are relevant here.

Count I alleged conspiracy to engage in a pattern of racketeering activity, and Count VII alleged substantive violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), specifically 18 U.S.C. § 1962(c) & (d). The predicate acts for these RICO charges included extortion, attempted extortion, mail fraud, wire fraud, collection of credit by extortionate means, and the use of interstate facilities in the furtherances of unlawful activity. Counts II-V separately charged the defendants with substantive mail fraud counts against the University of Michigan, Michigan State University, the University of Iowa and Purdue University, respectively, in violation of 18 U.S.C. § 1341. Count VI alleged conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.

A jury trial was held before Judge George M. Marovich from March 6, 1989 through April 6, 1989. After a week of deliberation, the jury found Walters and Bloom guilty on five of the seven counts. The defendants were found not guilty of mail fraud against two of the universities under Counts III and IV. In a special verdict, the jury indicated that it did not find that Walters or Bloom had committed the extortion-related charges. On June 19, 1989, Judge Marovich sentenced Walters to five years in custody to be followed by five years probation. Bloom received a three-year sentence to be followed by five years probation. Both defendants moved for a new trial and upon the denial of this motion filed a timely notice of appeal.

II. DISCUSSION

On appeal, Walters and Bloom raise a series of challenges to the procedures followed at their trials. Two of these issues—the refusal by the court to tender an instruction that Walters' actions may have been predicated on the advice of counsel and the denial of Bloom's motion for severance—were sufficiently prejudicial to the defendants to warrant reversal of their convictions and a new trial.

A. Walters' Advice-of-Counsel Instruction

The linchpin of Walters' defense was that his actions were taken in good faith based upon the advice of his attorneys. If the jury accepted this characterization of the events, Walters could not have been considered to have formed the specific intent necessary to commit fraud upon the universities. *See United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1984) ("good faith, or the absence of an intent to defraud, is a complete defense to a charge of mail fraud.") This court has often stated, "[t]he defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by the law and which has some foundation in the evidence, however tenuous." *United States v. Briscoe*, 896 F.2d 1476, 1512 (7th Cir. 1990). *See also United States v. Boucher*, 796 F.2d 972, 975 (7th Cir. 1986); *United States v. Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969). On appeal, therefore, we must determine whether the evidence supports Walters' theory of good faith reliance on the advice of his counsel. *See United States v. Kelley*, 864 F.2d 569, 572 (7th Cir. 1989).

In January of 1985, Walters met with attorneys at Shea & Gould. In March of that year, he began signing his first clients. Walters' discussions with counsel, therefore, predated the actions taken in violation of the NCAA rules. The government vigorously contends that Walters did not reveal to his attorneys that his clients would lie on eligibility forms. By not revealing this material fact, the prosecution argues, Walters cannot now raise the advice-of-counsel defense. Walters, however, stresses that he was not aware of these forms.

Both sides admit that Walters' counsel informed him that although he would be violating NCAA rules by concealing the early recruiting of these athletes, he would not break the law by signing these concealed arrangements. It is not unreasonable to assume that the sports law experts at Shea & Gould would be aware of the eligibility forms required of athletes by universities and the NCAA. Nor would it have been unreasonable for those

attorneys to have considered how these forms might be addressed by Walters' technically ineligible clients. The lack of discussion could signal that Walters was unaware of the forms or that the Shea & Gould attorneys tacitly considered these forms in issuing their legal opinion.

The one possibility accepted by the court—that Walters simply chose to lie to his attorneys about his plans—seems patently unreasonable. Walters, by all accounts, was a rather unethical and unsavory businessman. He frequently operated outside the boundaries of truth and honesty. Yet, this does not persuade us that he would conceal material information from his attorney. Walters apparently sought out Shea & Gould *because* he feared that his actions might be illegal. Such a client is more likely to reveal all relevant information than one unconcerned by the consequences of his acts.

The trial court, however, is the place to make these determinations; it is not for us to determine whether Walters actually concealed material information from his attorneys. Whether Walters did conceal such information or not, however, the fact remains that there is substantial doubt about the circumstances of his legal advice. Such questions must be resolved by the jury—not the court. If Walters demonstrated evidence that he had provided to his attorneys all material information known to him, then the court must at least tender an instruction on the advice-of-counsel defense. We believe Walters presented sufficient evidence on which to support his theory of defense. He deserved an instruction explaining this theory. Nor can "arguments of counsel . . . substitute for instructions by the court[.]" *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978). Amid a sea of facts and inferences, instructions are the jury's only compass. Here, they were cast adrift. The court's failure to provide an instruction on Walters' theory of defense infected the fairness of his trial. Walters established the basis for such a defense and deserved such an instruction. The refusal to provide an advice-of-counsel instruction was therefore reversible error.

B. Bloom's Motion for Severance

Bloom contends that Walters' pursuit of an advice-of-counsel defense forced him to waive his attorney-client privilege. He therefore requested severance under Fed. R. Civ. P. 14. The court denied this request, stating that the privilege was held by WS&E as a corporate entity and not by Bloom individually. Under the court's approach, Walters, as the president of WS&E, was free to waive the attorney-client privilege surrounding all WS&E communications in pursuing his advice-of-counsel defense. Bloom now contends that this denial of his motion to sever was reversible error.

A decision not to sever the trials of co-defendants "is one within the sound discretion of the trial court and should be overturned only if it is found to be a clear abuse of discretion." *United States v. Penson*, 896 F.2d 1087, 1094 (7th Cir. 1990). Moreover, the defendant bears the burden of demonstrating that he was prejudiced by the denial of severance. *See United States v. Oglesby*, 764 F.2d 1273, 1275-76 (7th Cir. 1985). We have held, however, that severances are called for where the defenses of codefendants are "mutually antagonistic" or "irreconcilable . . . [such] that the acceptance of one party's defense will preclude the acquittal of the other." *United States v. Briscoe*, 896 F.2d 1476, 1518 (7th Cir. 1990). Even where defenses are not mutually antagonistic, a severance may be granted "if the actual conduct of one defendant's defense unduly prejudices his or her co-defendant." *See United States v. Mazzanti*, 888 F.2d 1165, 1172-73 (7th Cir. 1989); *United States v. Rollins*, 862 F.2d 1282, 1290 (7th Cir. 1988).

The first issue we must resolve is whether an attorney-client relationship existed between Shea & Gould and Lloyd Bloom as an individual or whether Shea & Gould simply represented the corporate entity of WS&E. According to the testimony, Walters and Bloom approached the attorneys for civil, administrative and *criminal* law advice. Shea & Gould did not merely provide information about how to draft representation contracts, but offered opinions about the criminality of Walters' and Bloom's actions. The agents

were informed that although they were violating NCAA rules they were not breaking any laws. This court has stated that determination of the existence of the attorney-client privilege "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978). Bloom confided highly personal information about his activities to his lawyers in order to secure their opinions about the criminal ramifications of these acts. He was acting as an individual, not an officer of a corporation, at that time. We believe the attorney-client relationship was established under these circumstances. The communications between Bloom and his attorneys at Shea & Gould are therefore privileged. Only Bloom, not Walters, could waive this privilege.

This does not end our inquiry, however. Next we must determine whether Bloom's trial was prejudiced by the violation of this privilege. We believe that such prejudice did occur. When Walters pursued his advice-of-counsel defense, Bloom was forced to observe his own attorneys testify about the intimate discussions to which he had been a party. Bloom could not pursue his own defense, but was forced to skittle along behind that of Walters. Details which Bloom chose to share with his attorney were now available to the prosecution and broadcast to the jury. Bloom's counsel did not wish to pursue the advice-of-counsel gambit with Walters. In fact, Bloom's counsel stated to the court that Walters' theory had "gone over like a lead balloon" with the jury. Given that prejudicial error occurred in Walters' defense, we are persuaded that Bloom was prejudiced as well. Walters' conduct of defense "unduly prejudiced his . . . co-defendant." *Massanti*, 888 F.2d at 1173.

The attorney-client privilege ranks high among the precious gems of our adversary system of justice. We should not allow it to be tarnished so easily. We recognize that joint trials are an essential element of the quick administration of justice. If every defendant who wanted a severance was given one, the slow pace of our court system would go from a crawl to paralysis; any motion for severance must be balanced against the need for judicial economy. Here, no such balance can be reasonably struck. Where, as here, the attorney-client privilege is compromised by joint trials, we must rule on the side of severance. Once Walters pursued his advice-of-counsel defense, as was his right, Bloom must have been provided the option of a separate trial. Any other course of action forced Bloom to waive his attorney-client privilege. We cannot tolerate such devil's bargains. The denial of Bloom's motion for severance under these circumstances was outside the court's discretion. Bloom must be given another trial in which to pursue his own defense free from that of his co-defendant.

III. CONCLUSION

The court erred by not providing an advice-of-counsel instruction to the jury as requested by Walters. Walters reasonably developed this defense and he deserved to have the jury, not the court, determine its validity. He was substantially prejudiced by the omission. Moreover, as Walters pursued this advice-of-counsel defense, this necessarily compromised Bloom's attorney-client privilege. Only Bloom could properly waive this privilege. He did not. The denial of his motion for severance, therefore, was reversible error. Because we reverse on these issues, we do not reach the remaining contentions raised by the defendants.

REVERSED AND REMANDED WITH INSTRUCTIONS TO PROCEED ACCORDING TO THE INSTRUCTIONS CONTAINED HEREIN.

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